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## A Girl's Right to Bare Arms: An Equal Protection Analysis of Public-School Dress Codes

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# A GIRL'S RIGHT TO BARE ARMS: AN EQUAL PROTECTION ANALYSIS OF PUBLIC-SCHOOL DRESS CODES

**Abstract:** Public schools throughout the country have faced heavy criticism for instituting dress codes that many perceive to be targeting girls and imposing overly restrictive requirements on their attire. Critics of public-school dress codes often take particular issue with the notion that restrictive dress codes are necessary to prevent classroom distractions. Because public schools are state actors, they must comply with constitutional requirements. Thus, when schools impose different rules on the basis of gender, those rules must comply with the Equal Protection Clause of the U.S. Constitution. This clause mandates that the government offer an exceedingly persuasive justification for any sex-based classification. Moreover, the justification offered by the school must be genuine and may not rely on nor perpetuate gender-based stereotypes. Courts have generally accepted schools' arguments that their dress codes served the interests of student health and safety, preventing classroom distraction, and instilling morals and discipline. This Note evaluates the application of the Equal Protection Clause to public-school dress codes, explores the various school justifications that have been deemed acceptable, and argues that, under the standard set forth in Equal Protection jurisprudence, a school's desire to prevent classroom distraction may no longer be an acceptable defense absent authentic evidence of its necessity.

## INTRODUCTION

In 2018, Lizzy Martinez, a seventeen-year-old Florida public high school student, received a painful sunburn on her chest over the weekend and found that wearing a bra exacerbated her pain.<sup>1</sup> The following Monday, she decided not to wear a bra to school, instead opting to wear a dark oversized shirt that would not attract any attention to her chest.<sup>2</sup> After a few hours at school, she was called out of her class and sent to meet with the principal and dean of the school.<sup>3</sup> They told her that, despite her painful sunburn, her decision not to wear a bra was a violation of the school's dress code.<sup>4</sup> Though none of Lizzy's

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<sup>1</sup> Hayley Krischer, *Is Your Body Appropriate to Wear to School?*, N.Y. TIMES (Apr. 17, 2018), <https://www.nytimes.com/2018/04/17/style/student-bra-nipples-school.html> [<https://perma.cc/MC5N-2TTX>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* Though the dress code did not explicitly require female students to wear bras, the school nevertheless maintained that it was a violation of the code. *Id.*; see SCH. DIST. OF MANATEE CTY., CODE OF STUDENT CONDUCT: 2017-2018, at 28–30 (2017), [https://www.manateeschools.net/cms/lib/FL02202357/Centricity/domain/1115/documents/2017-2018\\_Student\\_Code\\_of\\_Conduct.pdf](https://www.manateeschools.net/cms/lib/FL02202357/Centricity/domain/1115/documents/2017-2018_Student_Code_of_Conduct.pdf) [<https://>

classmates had commented on her outfit, the dean told her that boys had been staring and laughing.<sup>5</sup>

In a similar 2016 incident, an eleven-year-old Maryland girl was forced to miss twenty minutes of class because she wore leggings to school, which was a violation of the public school's dress code.<sup>6</sup> Her mother confronted school officials after having to bring her daughter a pair of jeans.<sup>7</sup> The officials told her that it serves as a classroom distraction when girls wear leggings and the ends of their shirts fail to reach the length of their fingertips.<sup>8</sup> They claimed that similar rules were imposed on male students and that they were meant to prepare students for college and their careers.<sup>9</sup> The girl's mother disagreed, characterized the policy as discriminatory, and told a reporter that she planned to take legal action.<sup>10</sup>

Public-school dress codes have recently received a great deal of attention, with many people arguing that they target, either explicitly or implicitly, female students.<sup>11</sup> As more and more dress codes face such accusations, students

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perma.cc/2SP6-CA5Y] (setting forth the school's dress code policy). The dress code details the specific types of clothing that both males and females are allowed to wear and lists a general prohibition of certain types of clothes for any student. SCH. DIST. OF MANATEE CTY., *supra*, at 28–30. There is no mention of bras, but the most applicable provisions state that for both genders, “all undergarments must be covered” and “any clothing . . . that may be a distraction to self or others” is forbidden. *See id.*

<sup>5</sup> Krischer, *supra* note 1.

<sup>6</sup> Donna St. George, *Are Leggings Too Distracting? A Mom Takes on a 'Sexist' School Dress Code*, WASH. POST (Nov. 5, 2016), [https://www.washingtonpost.com/local/education/are-leggings-too-distracting-a-mom-takes-on-sexist-school-dress-code/2016/11/05/2c677b00-960e-11e6-bc79-af1cd3d2984b\\_story.html](https://www.washingtonpost.com/local/education/are-leggings-too-distracting-a-mom-takes-on-sexist-school-dress-code/2016/11/05/2c677b00-960e-11e6-bc79-af1cd3d2984b_story.html) [https://perma.cc/UYT2-WCCE].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See* Laura Bates, *How School Dress Codes Shame Girls and Perpetuate Rape Culture*, TIME (May 22, 2015), <https://time.com/3892965/everydaysexism-school-dress-codes-rape-culture> [https://perma.cc/DA7P-ZPU7] (arguing that dress codes imply that “[g]irls’ bodies are dangerous and harassment is inevitable”); Soraya Chemaly, *What School Dress Codes Have to Do with Harvey Weinstein*, WASH. POST (Oct. 20, 2017), <https://www.washingtonpost.com/news/parenting/wp/2017/10/20/what-school-dress-codes-have-to-do-with-harvey-weinstein> [https://perma.cc/3XSZ-7HSW] (arguing that school dress codes are often directed at girls and objectify them in a way that contributes to a culture of sexual harassment); Peggy Orenstein, *The Battle Over Dress Codes*, N.Y. TIMES (June 13, 2014), <https://www.nytimes.com/2014/06/14/opinion/the-battle-over-dress-codes.html> [https://perma.cc/47BJ-U5YA] (expressing concern that school dress codes are targeting and sexualizing girls); *see, e.g.*, Kristin Finan, *Austin Schools’ Dress Codes ‘Sexist, Racist’ Group Says*, AUSTIN AM.-STATESMAN (Oct. 8, 2018), <https://www.statesman.com/news/20181008/austin-schools-dress-codes-sexist-racist-group-says> [https://perma.cc/5CJV-YC58] (describing a Texas school district in which a majority of the students suspended for dress code violations were female); Sonja Haller, *Texas Principal Apologizes for Sexist ‘Bad Girls’ Dress Code Video After It Goes Viral*, USA TODAY (Aug. 20, 2018), <https://www.usatoday.com/story/life/allthemoms/2018/08/20/questionable-school-dress-code-video-goes-viral-principal-apologizes/1043770002/> [https://perma.cc/D2E6-DGWQ] (describing the criticism another Texas school faced for displaying a video with the following features: only female students violating the dress code, the students being required to repeatedly chant a promise not to wear



been set in the context of public-school dress codes.<sup>18</sup> Part II extracts a legal standard under which to evaluate dress codes in light of the relevant case law.<sup>19</sup> Lastly, Part III reexamines the standards set forth in dress code litigation in a more modern light and argues that schools may no longer be able to justify their dress codes by arguing that they prevent distraction.<sup>20</sup>

## I. CHALLENGES TO DRESS CODES: WEAVING TOGETHER THE LEGAL BACKGROUND

Although some students have chosen to challenge their schools' dress codes through measures such as protests and attendance at schoolboard meetings, others have sought change in court.<sup>21</sup> One approach has been to file a complaint against the school district alleging a violation of the Equal Protection Clause of the U.S. Constitution.<sup>22</sup> This Part provides an overview of the relevant case law that serves as a guideline in evaluating dress codes that allegedly target female students under the Equal Protection Clause.<sup>23</sup> Section A details the Supreme Court's approach to gender discrimination within the context of Equal Protection.<sup>24</sup> Section B examines cases addressing allegedly sex-discriminatory dress codes and the various approaches courts have taken.<sup>25</sup>

### A. *Equal Protection*

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying citizens equal protection of the laws.<sup>26</sup> Thus, when the government creates a classification that treats certain classes of people differently, and the classification bears no relation to the purpose of the government action, it will be deemed unconstitutional.<sup>27</sup> Enacted in the nineteenth century,

<sup>18</sup> See *infra* notes 21–128 and accompanying text.

<sup>19</sup> See *infra* notes 129–175 and accompanying text.

<sup>20</sup> See *infra* notes 176–212 and accompanying text.

<sup>21</sup> See *Brunswick*, *supra* note 14 (describing lawsuit filed by the Peltier family, amongst others, challenging a school's policy requiring that female students wear skirts instead of pants under the Equal Protection Clause); *Krischer*, *supra* note 1 (describing protests against dress codes); *Schantz*, *supra* note 13 (telling story of students convincing their school board to change their dress code); see also *Peltier*, 384 F. Supp. 3d at 595–97 (addressing Peltier's Equal Protection claims).

<sup>22</sup> *Peltier*, 384 F. Supp. 3d at 595–97; see *Brunswick*, *supra* note 14 (noting that the lawsuit was brought under both the Equal Protection Clause and Title IX).

<sup>23</sup> See *infra* notes 26–128 and accompanying text.

<sup>24</sup> See *infra* notes 26–57 and accompanying text.

<sup>25</sup> See *infra* notes 58–128 and accompanying text.

<sup>26</sup> U.S. CONST. amend. XIV § 1.

<sup>27</sup> See *Reed v. Reed*, 404 U.S. 71, 75–76 (1971) (noting the general authority of the states to treat groups differently when the classification relates to the objective of the government action); *Ryan James & Jane Zara, Equal Protection*, 4 GEO. J. GENDER & L. 1, 2 (2002) (noting that the government is not prohibited from discriminating under the Equal Protection Clause unless the discrimination is “invidious”). Courts evaluate certain distinctions, characterized as suspect classifications, with greater

the Equal Protection Clause was first used to invalidate a sex-based classification in the 1970s.<sup>28</sup>

The current standard for evaluating government classifications on the basis of sex was developed in the 1996 U.S. Supreme Court case, *United States v. Virginia*.<sup>29</sup> Virginia Military Institute (VMI) was a male-only university that employed a unique and rigorous method of training in order to prepare men to excel as “citizen-soldiers.”<sup>30</sup> VMI’s male-only admissions policy was challenged in 1990 after a female student, who wanted to attend VMI, filed a complaint with the Attorney General.<sup>31</sup> Pursuant to an order from the Fourth Circuit Court of Appeals, Virginia sought to remedy the Equal Protection violation by establishing a parallel program for women.<sup>32</sup> The program shared the same

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scrutiny. See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (noting the traditional classifications that have been deemed “inherently suspect” and adding classifications on the basis of sex to the list, thereby subjecting it to heightened scrutiny). There are three levels of scrutiny under the Equal Protection Clause and classifications are more likely to be found unconstitutional under the higher levels of scrutiny. James & Zara, *supra*, at 4–5. The highest level, called strict scrutiny, applies to race and national origin and requires a “compelling government interest” that is “narrowly tailored.” See *id.* at 5–6 (discussing the factors and characteristics that warrant a classification being deemed suspect and thus receiving strict scrutiny). Classifications such as sex and legitimacy are considered quasi-suspect and receive heightened scrutiny, which requires that the classifications be “substantially related” to “an important governmental objective” in order to survive. *Id.* at 8–9. Lastly, classifications that are neither suspect nor quasi-suspect are subject to the much more deferential rational basis review, which only requires a “rational relationship to a legitimate government interest.” *Id.* at 9–10.

<sup>28</sup> See *Virginia*, 518 U.S. at 532 (discussing the history of sex-based classifications under the Equal Protection Clause). See generally *Reed*, 404 U.S. at 74–75, 77 (ruling that classification on the basis of sex is an issue under the Equal Protection Clause and invalidating an Idaho law favoring males as the administrator of an estate because the law bore no “rational relationship” to the purpose of the law); *Hoyt v. Florida*, 368 U.S. 57, 58, 68–69 (1961) (upholding under the Equal Protection Clause a Florida law that generally exempted women from serving on juries). Sex-based classifications were subject to inconsistent levels of scrutiny for a significant period of time. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a sex-based classification); *Frontiero*, 411 U.S. at 688 (applying strict scrutiny to a sex-based classification); *Reed*, 404 U.S. at 76 (applying rational basis review to a sex-based classification); James & Zara, *supra* note 27, at 14–18 (discussing the levels of scrutiny applied to sex-based classifications). Since 1996, heightened scrutiny has remained the proper level. See *Virginia*, 518 U.S. at 533 (describing the level of scrutiny as one that requires an “exceedingly persuasive” justification). Moreover, some have actually interpreted it to be somewhat in between heightened and strict scrutiny. See James & Zara, *supra* note 27, at 26–29 (discussing the legacy and interpretations of *Virginia*).

<sup>29</sup> *Virginia*, 518 U.S. at 532–33; see *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (describing the standard set forth in *Virginia* and characterizing it as a heightened scrutiny because it is a more difficult standard to meet than rational-basis review).

<sup>30</sup> *Virginia*, 518 U.S. at 520–22. VMI’s mission to produce “citizen-soldiers” was one that sought to prepare students to be future civilians and members of the military. *Id.* In order to achieve this objective, the educational model pushed students to learn how to thrive under significant amounts of stress and rigorous physical training. *Id.*

<sup>31</sup> *Id.* at 523.

<sup>32</sup> *Id.* at 526. Initially, the District Court found that VMI’s exclusion of women was justified under the Supreme Court’s Equal Protection jurisprudence. *Id.* at 523–24. On appeal, the Fourth Circuit Court of Appeals found an Equal Protection violation, remanded the case, and instructed Virginia to

mission as VMI but lacked the same educational and financial resources.<sup>33</sup> It also employed educational methods that were starkly different from VMI's unique training.<sup>34</sup> The Supreme Court granted certiorari in order to address whether VMI's male-only policy violated the Equal Protection Clause and, if so, whether the parallel program was a sufficient remedy.<sup>35</sup>

Writing for the majority, Justice Ginsburg reiterated that the Equal Protection Clause places a burden on the government to prove the existence of an "exceedingly persuasive justification" for a sex-based classification.<sup>36</sup> Specifically, the government is required to show that an important objective is served by the classification and that the discriminatory classification is substantially related to that objective.<sup>37</sup> The justification may not be based on, nor perpetuate, stereotypes about the capabilities or inclinations of men and women.<sup>38</sup> Moreover, although there are natural differences between males and females that do not have to be ignored, these distinctions must not be used to legally, socially, or economically subordinate women.<sup>39</sup>

Virginia argued that VMI's exclusion of women was justified because it yielded significant educational benefits by allowing for more diverse educational methods.<sup>40</sup> It also defended the single-sex policy by arguing that the unique method of training would be unsuitable for women and that admitting women would force the school to make dramatic and detrimental changes to their program.<sup>41</sup> The Court, however, was unwilling to automatically accept a justification without actual evidence.<sup>42</sup> It rejected the educational diversity jus-

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either admit women, create a parallel school for women, or stop accepting government funding for VMI. *Id.* at 524–26.

<sup>33</sup> *Id.* at 526.

<sup>34</sup> *See id.* at 526–27 (noting that, unlike the adversative methods used at VMI, the women's program was cooperative and designed to raise participants' self-esteem).

<sup>35</sup> *Id.* at 530–31.

<sup>36</sup> *See id.* at 533–34 (summarizing and expanding on Equal Protection jurisprudence in the context of sex discrimination).

<sup>37</sup> *Id.* at 533.

<sup>38</sup> *See id.* at 533–34 (requiring that the justification be "genuine, not hypothesized" and prohibiting it from being based on gendered stereotypes); *see, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982) (finding a nursing school's admission policy's exclusion of males to violate the Equal Protection Clause and describing it as one that "perpetuate[s] the stereotype" that nursing is a career meant only for women and turns it into a "self-fulfilling prophecy").

<sup>39</sup> *See Virginia*, 518 U.S. at 533–34 (noting that biological differences between men and women are to be celebrated but not used to subjugate women in any capacity).

<sup>40</sup> *Id.* at 535. The Court, in response to this argument, acknowledged that single-sex education can be a beneficial form of education in some circumstances, but found that this was not the genuine purpose of excluding women. *Id.*

<sup>41</sup> *Id.* at 540. Similarly, in defense of their parallel women's program, Virginia argued that it was sufficiently remedial because the differences between the two programs were justified by the differences between the psychological, physical, and educational needs of men and women. *Id.* at 549.

<sup>42</sup> *See id.* at 535–36 (requiring that the justification be an actual description of the government's purposes).

tification, as Virginia failed to offer any other proof that this was a genuine purpose in their admissions policy.<sup>43</sup> Moreover, in response to the argument that VMI's training would be unsuitable for women and that their admission would harm the program, the Court acknowledged that some aspects of the program would need to be changed in order to acclimate women.<sup>44</sup> The Court also noted that this is not necessarily true of all women and that the state could therefore not rely on such a broad, and potentially self-fulfilling, stereotype to deny all women this opportunity.<sup>45</sup> Because the exclusion of women did not significantly help VMI achieve its ultimate mission of producing citizen-soldiers, the court found that Virginia failed to demonstrate an acceptable justification.<sup>46</sup>

A governmental sex-based classification will be constitutional only when the justification is exceedingly persuasive and substantially connected to the accomplishment of the government's objective.<sup>47</sup> Classifications that are based on real biological differences between males and females, such as pregnancy and childbirth, are more likely to withstand heightened scrutiny.<sup>48</sup> On the other hand, courts are unlikely to find a sufficient link between the means and the ends when the distinction is grounded in stereotypes.<sup>49</sup> Moreover, the Supreme

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<sup>43</sup> See *id.* at 536–40 (noting VMI's historical exclusion of women).

<sup>44</sup> See *id.* at 540 (noting the main aspects of the program that would need changing to be "housing assignments and physical training programs"). The Court referred to a significant amount of testimony that supported the notion that many women would be unable to handle the rigorous training methods employed, but that some women would be more than capable of doing so. *Id.* at 540–41. The court characterized this evidence as describing "tendencies" of women and pointed to previous decisions that cautioned courts from accepting overly broad tendencies as justifications for sex-based classifications. *Id.* at 541; see, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 139 n.11 (1994) (noting that empirical data that provides some support for a gendered stereotype will not cure an Equal Protection violation); *Miss. Univ. for Women*, 458 U.S. at 724–25 (prohibiting classifications from relying on "fixed notions" about men and women).

<sup>45</sup> See *Virginia*, 518 U.S. at 541–45 (noting that although many women would be averse to VMI's methodology, it was likely that many men would feel the same way). Additionally, the Court found that Virginia's defense of its parallel program, which was based on the different needs of men and women, also relied too much on overly broad stereotypes. *Id.* at 549–50 (noting that some women would thrive under VMI's educational model).

<sup>46</sup> *Id.* at 546.

<sup>47</sup> *Id.* at 533; see *Nguyen v. INS*, 533 U.S. 53, 70 (2001) (discussing the requirement that there be a "fit between the means and . . . ends").

<sup>48</sup> See, e.g., *Nguyen*, 533 U.S. at 63–64 (upholding a law because it was based on real biological differences). In *Nguyen*, the Court reviewed a law setting forth the requirements of attaining citizenship for a child born overseas to unmarried parents when one of the child's parents is a United States citizen, but the other is not. *Id.* at 59. The law imposed additional requirements to prove parenthood when the child's father was the United States citizen rather than the mother. *Id.* at 60. The Court upheld the law, pointing to the legitimate government interest in assuring a meaningful relationship between the parent and child. *Id.* at 70. The Court also reasoned that the realities of pregnancy and childbirth assure that the mother will have the opportunity to develop a meaningful relationship with her child more so than the father would be able to. *Id.* at 65.

<sup>49</sup> See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692–94 (2017) (invalidating a statutory provision that relied on overbroad generalizations regarding female nurturance and domesticity, which



Court has indicated in dicta that Equal Protection decisions can be affected by new or evolving societal points of view and that things which were once acceptable may now be deemed unequal.<sup>50</sup>

A sex-based classification need not be explicit in order to trigger constitutional scrutiny.<sup>51</sup> Rather, a facially neutral law, one that is universally applicable to both genders, can still violate the Equal Protection Clause when it has a

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the court noted are harmful stereotypes that create self-fulfilling prophecies regardless of how accurate they may be); *Nev. Dep't of Human Res.*, 538 U.S. at 736 (noting that stereotypes about women's domestic roles are paralleled by stereotypes about men not having to fulfill those roles and create a "self-fulfilling cycle of discrimination"); *Virginia*, 518 U.S. at 549–50 (declining to accept a justification based on women's supposed preferences or capacities regarding physical and educational training).

<sup>50</sup> See *Morales-Santana*, 137 S. Ct. at 1690 (“[T]he classification must substantially serve an important governmental interest *today*, for ‘in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.’” (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015))); *Obergefell*, 135 S. Ct. at 2603 (noting that new recognitions of what constitutes inequality can inform Equal Protection analyses); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) (“[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality . . . . Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change.”) (discussing a poll tax creating a distinction on the basis of wealth). The *Harper* Court supported this notion by pointing to the Supreme Court's approach to racial segregation, in which the Court overturned a prior decision finding segregation to be constitutional under the Equal Protection Clause. 383 U.S. at 669–70 (first citing *Brown v. Board of Education*, 347 U.S. 483, 492 (1954), then citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)); see *Brown*, 347 U.S. at 492 (“In approaching this problem, we cannot turn back the clock to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written.”). Several lower courts have applied this notion as a background consideration in various Equal Protection analyses. See, e.g., *Adams v. Sch. Bd. of St. Johns Cty*, 318 F. Supp. 3d 1293, 1313, 1320 (M.D. Fla. 2018) (importing the concept of “new insights and societal understandings . . . reveal[ing] unjustified inequality” in its iteration of the Equal Protection analysis and ultimately finding that a public school's prohibition of a transgender student from the boys' restroom violated Equal Protection (quoting *Morales-Santana*, 137 S. Ct. at 1690)); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144–45 (D. Idaho 2018) (finding that transgender status qualifies as a suspect identification (citing *Obergefell*, 135 S. Ct. at 2603)); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 313–14, 333 (D. Conn. 2012) (discussing *Harper* and the notion of elasticity in concluding that sexual orientation is likely a suspect classification under the Equal Protection Clause (citing *Harper*, 383 U.S. at 669)). For example, in a recent decision finding the male-only registration requirement for the draft to be an Equal Protection violation, one court noted that a past Supreme Court decision upholding this requirement was no longer controlling due to a significant increase in women's participation in the military. *Nat'l Coal. for Men v. Selective Serv. Sys.*, 2019 U.S. Dist. LEXIS 28851, at \*13–14 (S.D. Tex. Feb. 22, 2019). The court noted in the beginning of the Equal Protection analysis that government interests that have been deemed acceptable in the past may no longer support a gender-based classification today. *Id.* at \*14 (citing *Obergefell*, 135 S. Ct. at 2603). Thus, although this classification was justified in the past, it now reflects outdated stereotypes about the preferences and capabilities of men and women. See *id.* at \*19–20, \*25–26 (concluding that the policy's proponents were unable to demonstrate that the policy continued to be sufficiently related to the government's goal of raising and supporting the army).

<sup>51</sup> See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 259 (1979) (addressing an Equal Protection sex-discrimination challenge to a state statute that gave hiring priority to veterans for civil service jobs).

disproportionately harmful impact on one gender in a way that reflects sex discrimination.<sup>52</sup> In the 1979 case, *Personnel Administrator of Massachusetts v. Feeney*, the U.S. Supreme Court prescribed a two-step inquiry into gender neutral laws.<sup>53</sup> The first step is to determine whether the law is genuinely gender-neutral, rather than implicitly based on gender.<sup>54</sup> The next step is to ascertain whether the disparate impact was intentional in that the impact on one gender influenced the enactment of the policy.<sup>55</sup> In order to prevail on an Equal Protection challenge to a gender-neutral law, it is insufficient to prove that disproportionate impact on one gender is merely incidental.<sup>56</sup> In addition, classifications, either explicit or neutral, do not have to disadvantage or target women in order to be problematic; the same level of scrutiny applies when the policy discriminates against males and favors females.<sup>57</sup>

### B. Dress Code Litigation

The Supreme Court has expressed concern about judicial interference in education that intrudes on the role of state and school officials.<sup>58</sup> The Court has

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<sup>52</sup> See *id.* at 274 (setting forth the constitutional framework for analyzing sex discrimination challenges to gender-neutral laws). In *Feeney*, the Court evaluated a challenge to a Massachusetts civil service statute that gave hiring preference to veterans on the grounds that it disproportionately favored males. *Id.* at 259. Applying the two-step analysis, the Court found that the statute was facially neutral because a veteran may be male or female, and that the mere awareness of the potential disproportionate impact, with no other proof of a preference for males, did not amount to a discriminatory purpose. *Id.* at 274–75, 279.

<sup>53</sup> *Id.* at 274.

<sup>54</sup> See *id.* at 275 (explaining that one method of employing this analysis is to inquire whether the law could be “plausibly explained on a neutral ground” and that if it cannot, a classification has likely been made). The Court found that the veteran hiring preference could only be rationally explained on a gender-neutral ground, and thus, it was a gender-neutral law. *Id.*

<sup>55</sup> See *id.* at 276–79 (elaborating that the governmental choice must be made “because of, not merely in spite of, its adverse effects upon an identifiable group”) (internal quotations omitted). The Court found that there was no purposeful discrimination here because there was no evidence that the legislature’s decision was based on anything other than giving a hiring preference to veterans. *Id.*

<sup>56</sup> See *id.* at 275 (finding that the disproportionate impact on women did not reflect gender discrimination); see, e.g., *Zalewska v. Cty of Sullivan*, 316 F.3d 314, 323 (2d Cir. 2003) (upholding a government program’s uniform policy requiring van drivers to wear pants rather than skirts because the policy was gender neutral and only incidentally impacted female employees).

<sup>57</sup> See *Miss. Univ. for Women*, 458 U.S. at 723 (observing how a nursing school’s admission policy discriminating against males does not protect the policy from Equal Protection challenges nor affect the level of scrutiny applied); see, e.g., *Craig*, 429 U.S. at 197 (evaluating a statute imposing a higher age requirement on males seeking to purchase alcohol than on females).

<sup>58</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (noting that the Court has consistently expressed the view that parents and local officials, rather than federal judges, have the duty of educating children); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (noting that state and local governments have authority with regards to the operation of schools and advising so that, as a result, particular caution must be exercised when courts get involved); Meredith Johnson Harbach, *Sexualization, Sex Discrimination, and Public School Dress Codes*, 50 U. RICH. L. REV. 1039, 1053 (2016) (noting that the Supreme Court has given greater deference to school administrations than in other circumstances).

given significant consideration to the fact that schools have the expertise in and vital responsibility of caring for and educating the nation's youth, preparing them for professional life, and teaching them important cultural values.<sup>59</sup> On numerous occasions, the Court has also noted that public schools play an important role in the nation's democracy by preparing students to be citizens and instilling values that are necessary for a successful democratic political system.<sup>60</sup> In order to allow schools to fulfill these vital functions, the Court has given them substantial leeway to regulate student conduct and has noted that the constitutional rights of students may, at times, differ than those of adults.<sup>61</sup> At the same time, the Court has also emphasized that this does not mean that school officials can yield unlimited power over students.<sup>62</sup> The authority of school officials stops short of constitutional violations.<sup>63</sup> Students are therefore

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<sup>59</sup> See *Hazelwood Sch. Dist.*, 484 U.S. at 271–73 (discussing the responsibility and authority of school officials to determine what is appropriate and consistent with their educational goals); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) (noting that courts generally have little experience and expertise in educational policy); *Brown*, 347 U.S. at 493 (noting the important role that education plays in teaching students cultural values and preparing them for their futures); see also *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371 n.1 (2009) (noting in the context of Fourth Amendment searches that courts should not override the judgement of school officials when it comes to regulating student behavior).

<sup>60</sup> See *Bethel v. Fraser*, 478 U.S. 675, 681 (1986) (finding it appropriate for schools to censor certain types of vulgar language by reasoning, in part, that democratic values reject this type of language in debates); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1981) (plurality opinion) (noting that the role that education plays in the maintenance of a democracy legitimizes schools' interests in instilling values and respect in students (citing *Ambach v. Norwick*, 441 U.S. 68, 77 (1979))); *Brown*, 347 U.S. at 493 (referring to education as the "very foundation of good citizenship").

<sup>61</sup> See *Bethel*, 478 U.S. at 682–83 (validating a school's regulation of speech at an assembly but noting that it would have been unconstitutional in an adult setting); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (emphasizing the importance of allowing school administrators to maintain the authority to regulate student behavior). Moreover, schools have even more discretion when they are regulating school curricula and other school-sponsored content, such as school newspapers or dramas. *Hazelwood Sch. Dist.*, 484 U.S. at 271 n.3 (applying a lesser degree of scrutiny to the school's regulation of its newspaper because the school was, in essence, affirmatively promoting the content, unlike a case in which a school attempted to regulate a student's personal expression that merely took place on school grounds (citing *Papish v. Univ. of Mo. Bd. of Curators*, 410 U.S. 667 (1973))); cf. *Pico*, 457 U.S. at 862, 869 (finding that judicial review of a school's removal of certain books from the library did not intrude on school curriculum and suggesting that school discretion is likely higher in choosing curricula because of the duty to instill community values).

<sup>62</sup> See *Tinker*, 393 U.S. at 511 (noting that schools are not allowed to impose total authority over students, as they are not "enclaves of totalitarianism").

<sup>63</sup> See *Pico*, 457 U.S. at 864–65 (noting that school officials' discretion must be exercised in a manner that is consistent with the First Amendment); *Epperson*, 393 U.S. at 107 (recognizing that constitutional protections are important to protect in schools and that the significant leeway given to school curricula does not grant schools the right to violate the Constitution). The fact that schools have the responsibility of preparing students for citizenship makes it even more important that students' constitutional rights remain protected. *Pico*, 457 U.S. at 864–65 (citing *W. Va. Bd. of Educ. v. Barnett*, 319 U.S. 624, 637 (1943)).

still protected by the Constitution and courts can and should step in to protect their rights.<sup>64</sup>

A majority of cases that challenge dress codes under the Equal Protection Clause come from the late 1960s and 1970s; many of which pertain to boys' hair length requirements.<sup>65</sup> Many dress codes have been challenged on other constitutional grounds, including the First Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>66</sup> Nevertheless, precedents established by prior Equal Protection challenges are a useful guide in demonstrating how courts may analyze allegedly sexist dress codes under the Equal Protection Clause if and when they choose to do so.<sup>67</sup>

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<sup>64</sup> See *Tinker*, 393 U.S. at 506 (emphasizing that students do not lose their constitutional rights when entering school premises). In *Tinker*, a group of students challenged their suspension from school caused by the armbands worn to protest the Vietnam War. *Id.* at 504. In discussing First Amendment issues, the Court reaffirmed that despite the significant degree of control school officials have, constitutional protections still apply to students. *Id.* at 506–07. The Court ruled that in order for school officials to regulate speech, there must be a constitutional and legitimate reason, but student conduct that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others” is not protected by the First Amendment. *Id.* at 511, 513.

<sup>65</sup> See Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187, 1215 (2016) (noting the significant number of challenges to grooming codes in the 1960s and 1970s); see also *Peltier*, 384 F. Supp. 3d at 596 (discussing the lack of relevant cases in recent times and the fact that most come from the Vietnam War era). Although dress code litigation under the Equal Protection Clause has been minimal, dress codes have continued to be challenged on other grounds. *Peltier*, 384 F. Supp. 3d at 595–96; see *infra* note 66 and accompanying text (discussing other constitutional challenges to public-school dress codes).

<sup>66</sup> Ben-Asher, *supra* note 65, at 1216 (noting that dress codes have been challenged under religious and transgender status grounds); see, e.g., *A.A. v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 877 (S.D. Tex. 2009) (granting a Native American student's request for a preliminary injunction against a school's requirement that boys' hair not cover their ears because it was inconsistent with his religious beliefs). Even if no First Amendment or Equal Protection challenges can be made, control over one's personal appearance is still a liberty interest under the Fourteenth Amendment and subject to rational basis review. See *Kelley v. Johnson*, 425 U.S. 238, 244, 247–48 (1976) (assuming a Fourteenth Amendment liberty interest in matters of personal appearance and upholding a police department's grooming requirements under rational basis review). Moreover, Title IX, which bars schools from discriminating against students on the basis of sex, initially included a bar on discrimination in the form of rules dictating students' appearances, but it was repealed during the Reagan Administration. See 20 U.S.C. § 1681 (2012) (setting forth a general prohibition of discrimination on the basis of sex in educational institutions that receive federal funding); 34 C.F.R. § 106.31(b)(5) (2012) (prohibiting schools from “on the basis of sex . . . discriminat[ing] against any person in the application of any rules of appearance”); *Peltier*, 384 F. Supp. 3d at 589 (discussing the repeal of the policy disallowing discriminatory appearance rules under Title IX); Jennifer L. Greenblatt, *Using the Equal Protection Clause Post-VMI to Keep Gender Stereotypes Out of the Public School Dress Code Equation*, 13 U.C. DAVIS J. JUV. L. & POL'Y 281, 285–86 (2009) (discussing the history of the prohibition of discriminatory appearance rules in Title IX).

<sup>67</sup> See *supra* notes 68–128 and accompanying text.

## 1. Hair Regulations

As federal courts in the 1970s heard a significant number of challenges to dress codes requiring male students to keep their hair short, a circuit split emerged as to whether and how the Equal Protection Clause applied in this context.<sup>68</sup> Several courts decided these cases without discussing Equal Protection.<sup>69</sup> Others considered it but explicitly rejected its application, reasoning that disparate hair requirements were not a form of gender discrimination that belonged within the purview of the Equal Protection Clause.<sup>70</sup> Some courts that considered Equal Protection arguments characterized the classification as one between males with different hair lengths, which did not raise issues of sex discrimination.<sup>71</sup> Other courts considered challenges to hair length regulations

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<sup>68</sup> See *Hayden*, 743 F.3d at 577–78 (discussing the history of grooming standard jurisprudence and describing the approaches taken by various courts in the context of public-school dress codes and employment grooming standards); *Zeller v. Donegal Sch. Dist. Bd. of Educ.*, 517 F.2d 600, 602–03 (3d Cir. 1975) (outlining the approaches of each circuit, with four circuits treating Equal Protection challenges with greater favor and five circuits being less willing to hear such challenges); *Breese v. Smith*, 501 P.2d 159, 165 n.17 (Alaska 1972) (discussing the disagreement amongst federal courts); *Blaine v. Bd. of Educ.*, 502 P.2d 693, 697–98 (Kan. 1972) (discussing the circuits' split in views as to whether there is constitutional protection and if so under which amendment it falls); Greenblatt, *supra* note 66, at 283 (noting 150 hair length cases between 1968 and 1977). The Supreme Court denied multiple petitions for certiorari. See *Oloff v. E. Side Union High Sch. Dist.*, 404 U.S. 1042, 1045–46 (1972) (Douglas, J., dissenting) (arguing that, given the numerous prior petitions, the Court should grant certiorari to decide whether hair-length decisions constituted a liberty within the meaning of the Fourteenth Amendment and whether Equal Protection questions arose from this issue); see also *Breese*, 501 P.2d at 165 (noting silence on behalf of the Supreme Court with regard to the issue).

<sup>69</sup> See *Freeman v. Flake*, 448 F.2d 258, 260–61 (10th Cir. 1971) (discussing Due Process Clause and First Amendment claims); *Richards v. Thurston*, 424 F.2d 1281, 1284–85 (1st Cir. 1970) (finding a hair length requirement to be unconstitutional under the Due Process Clause and declining to apply the First Amendment); *Breen v. Kahl*, 296 F. Supp. 702, 705–06 (W.D. Wis. 1969) (addressing a hair length regulation under the Due Process Clause and First Amendment).

<sup>70</sup> See *King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932, 939 (9th Cir. 1971) (rejecting a gender-discrimination Equal Protection challenge to a school's hair length requirement); see also *Fagan v. Nat'l Cash Register Co.*, 481 F.2d 1115, 1117–19 (D.C. Cir. 1973) (considering a hair regulation imposed by an employer on male employees, expressing doubt about the application of Equal Protection in public-school cases, and rejecting the argument that such a policy can be considered sex discrimination). It should be noted, however, that *King* was decided several months before *Reed*, wherein the Supreme Court first invalidated a sex-based classification. See *Reed*, 404 U.S. at 77; *King*, 445 F.2d at 939.

<sup>71</sup> See *Karr v. Schmidt*, 460 F.2d 609, 616 (5th Cir. 1972) (finding a school policy limiting male students' hair length to create a distinction between males with different hair lengths, and upholding it under rational basis scrutiny); *Dunham v. Pulsifer*, 312 F. Supp. 411, 415 (D. Vt. 1970) (characterizing the distinction as one between students who conform with the school's grooming code and students who violate it). In *Karr*, the court compared this case to one in which sex discrimination was found under the Equal Protection Clause but distinguished the case by adopting the characterization used by the district court, which viewed the classification as one between males with short hair and males with long hair. 460 F.2d at 616.

on different grounds but indicated being open to the application of Equal Protection if the parties had raised the argument.<sup>72</sup>

In 1972, the Fifth Circuit Court of Appeals in *Karr v. Schmidt* adopted an ostensibly harsh stance against challenges to hair regulations in general.<sup>73</sup> District courts within the Fifth Circuit, however, have interpreted that stance in different ways.<sup>74</sup> The *Karr* court considered an Equal Protection argument but characterized the classification as one between boys with short and long hair.<sup>75</sup> The court distinguished the case from ones that found these policies to be discriminatory on the basis of sex.<sup>76</sup> The court ultimately proclaimed a per se rule deeming any hair length regulations to be constitutional and directed district courts to dismiss any constitutional challenges to them.<sup>77</sup> Several decades later—after the application of Equal Protection to sex discrimination was first established in *Reed v. Reed* and later developed in *United States v. Virginia*—district courts sought to determine whether the per se rule would still be applicable to sex-discrimination claims under the Equal Protection Clause.<sup>78</sup> For example, in the 2011 case, *Sturgis v. Copiah County School District*, the U.S. District Court for the Southern District of Mississippi interpreted the *Karr* court’s focus on hair-length classifications, rather than sex-based classifica-

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<sup>72</sup> See, e.g., *Massie v. Henry*, 455 F.2d 779, 783 (4th Cir. 1972) (finding that hair length restrictions implicate the Due Process Clause and briefly noting that they also have “overlapping Equal Protection Clause considerations”); *Bishop v. Colaw*, 450 F.2d 1069, 1074 (8th Cir. 1971) (noting that other courts have considered sex discrimination in grooming codes under the Equal Protection Clause, but that a sex discrimination argument was never raised in the case at hand).

<sup>73</sup> See *Karr*, 460 F.2d at 617–18 (finding public-school hair length requirements to be constitutional as a general matter).

<sup>74</sup> See *Sturgis v. Copiah Cty. Sch. Dist.*, 2011 U.S. Dist. LEXIS 105065, at \*4–5 (S.D. Miss. Sept. 15, 2011) (discussing the *Karr* rule in the context of a policy requiring students to dress in conformity with their gender for yearbook photographs); *A.A.*, 701 F. Supp. at 881–82 (discussing the applicability of *Karr* in a challenge to a hair length requirement under the Free Exercise Clause of the First Amendment); *Fenceroy v. Morehouse Par. Sch. Bd.*, 2006 U.S. Dist. LEXIS 949, at \*8–9 (W.D. La. Jan. 6, 2006) (discussing the Fifth Circuit’s reliance on *Karr* after the Supreme Court deemed sex to be a quasi-suspect classification); *infra* notes 78–81 and accompanying text (discussing various district courts’ interpretation of *Karr*).

<sup>75</sup> *Karr*, 460 F.2d at 616 (rejecting the notion that a classification between students of different hair lengths requires heightened scrutiny and upholding the policy under rational basis scrutiny).

<sup>76</sup> See *id.* (noting that the district court had decided that a hair-length-based classification was the relevant theory under which to apply an Equal Protection analysis and proceeding to take the same approach).

<sup>77</sup> *Id.* at 617–18.

<sup>78</sup> See *Sturgis*, 2011 U.S. Dist. LEXIS 105065 at \*4–5 (analyzing the relevance of the per se rule set forth in *Karr*); see also *A.A.*, 701 F. Supp. at 881–82 (finding *Karr* inapplicable in a First Amendment challenge to a hair-length requirement); *Fenceroy*, 2006 U.S. Dist. LEXIS 949 at \*8–9 (finding *Karr* to still be applicable to claims of sex discrimination under the Equal Protection Clause because the Fifth Circuit continued to rely on it). See generally *Virginia*, 518 U.S. at 533 (articulating and building upon the standard of analysis for allegations of sex discrimination under the Equal Protection Clause); *Reed*, 404 U.S. at 77 (finding unequal treatment between men and women to be a violation of Equal Protection).

tions, as a way of avoiding the issue of sex-discrimination altogether.<sup>79</sup> The *Sturgis* court thus denied a motion to dismiss a sex-discrimination Equal Protection challenge, reasoning that *Karr*'s silence on sex discrimination meant that its holding was not applicable.<sup>80</sup> Meanwhile, another court recognized that the Supreme Court subsequently characterized gender as a quasi-suspect class, yet still found that *Karr* is good law and gender-based hair regulations are therefore constitutional.<sup>81</sup>

The Seventh Circuit, on the other hand, has consistently found hair-length requirements imposed on only male students to be a violation of the Equal Protection Clause.<sup>82</sup> In 2014, in *Hayden v. Greensburg Community School Corp.*, the Seventh Circuit Court of Appeals addressed a short hair requirement imposed on members of a public high school boys' basketball team.<sup>83</sup> No such requirement existed for the girls' team.<sup>84</sup> When a seventh-grade boy was cut from the team for not cutting his hair, his parents sued the school alleging, amongst other things, sex discrimination in violation of the Equal Protection Clause.<sup>85</sup> The school argued that, because the policy applied only to the boys' basketball and baseball teams and not to other male sports teams, the policy was not discriminatory towards boys.<sup>86</sup> The court rejected that argument and instead focused on the fact that boys who wanted to play basketball had to adhere to a burdensome policy, which girls who wanted to do the same were free

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<sup>79</sup> See *Sturgis*, 2011 U.S. Dist. LEXIS 105065, at \*4–5 (evaluating a motion to dismiss in the context of mandated gendered clothing for yearbook photographs).

<sup>80</sup> See *id.* (pointing to further distinctions between *Karr* and the case at hand, noting specifically that the *Karr* court had a more complete record to evaluate the school's justifications and that it was addressing rules pertaining to the classroom, not yearbooks); see also *A.A.*, 701 F. Supp. at 881–82 (declining to follow *Karr* in discussion of hair-length requirements and the First Amendment). The school in *Sturgis* subsequently agreed to change its policy so that male and female students could wear the same outfit in their photographs. Ceara Sturgis, *My Name Is Ceara Sturgis, and I Am Not a Troublemaker*, ACLU (Dec. 8, 2011), <https://www.aclu.org/blog/lgbt-rights/lgbt-youth/my-name-ceara-sturgis-and-i-am-not-troublemaker> [<https://perma.cc/853Q-3QYS>] (describing the circumstances leading up to the lawsuit from the plaintiff's perspective).

<sup>81</sup> See *Fenceroy*, 2006 U.S. Dist. LEXIS 949, at \*8–9 (noting that the Fifth Circuit continues to rely on *Karr*). Nonetheless, neither of the cases that the court cited show that the Fifth Circuit relied on *Karr* for gender-discrimination claims. *Id.*

<sup>82</sup> See *Hayden*, 743 F.3d at 582 (ruling a school's policy requiring only male basketball players to have short hair unconstitutional under the Equal Protection Clause); *Crews v. Cloncs*, 432 F.2d 1259, 1266 (7th Cir. 1970) (finding a male-only short hair requirement to violate Equal Protection Clause because the school failed to explain why its proffered health and safety objectives applied only to boys or why the objectives could not have been achieved through narrower means such as shower caps or hair nets).

<sup>83</sup> *Hayden*, 743 F.3d at 572.

<sup>84</sup> *Id.* A similar requirement existed for the boys' baseball team, but no such policy existed for any of the other male sports teams nor for any of the female teams. *Id.*

<sup>85</sup> *Id.* at 573–74. The plaintiffs also argued that the dress code policy was a violation of Title IX and of the Due Process Clause of the Fourteenth Amendment. *Id.* at 574.

<sup>86</sup> *Id.* at 579.

to ignore.<sup>87</sup> The school also argued that the plaintiff lacked the requisite proof of discriminatory intent.<sup>88</sup> The court, however, distinguished this case from ones in which the law was facially neutral and instead found that a rule imposed only on boys creates an explicit gender classification, which, on its own, served as proof of discriminatory intent.<sup>89</sup> Because a classification was made on the basis of sex, the court then considered the school's justifications: that short hair was necessary to keep a player's hair out of his eyes while they play and to create a uniform look that fostered team unity.<sup>90</sup> The court found that these were legitimate reasons for a hair length standard in general, but that girls' teams have just as much of a need to keep their hair out of their eyes and to build team unity.<sup>91</sup> Thus, because the rationale did not support the disparate treatment, there was no exceedingly persuasive justification for the sex-based classification.<sup>92</sup>

## 2. Clothing Regulations

Prior to the Supreme Court's 1996 decision in *United States v. Virginia*, some gender-based Equal Protection challenges to school clothing requirements were unsuccessful.<sup>93</sup> Despite this, some students were able to effectively

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<sup>87</sup> See *id.* (noting the fact that the hair length policy is only applicable to some, rather than all, boys does not automatically immunize it from constitutional challenges because the Equal Protection Clause protects individuals, not groups). The court also noted that it was irrelevant that boys who wanted to play other sports did not have to adhere to this policy because the individual plaintiff sought to play basketball, not the other sports. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See *id.* ("This is a case of disparate treatment rather than disparate impact . . . . The intent to treat boys differently from girls is therefore evident from the one-sided nature of the policy."); cf. *Feeney*, 442 U.S. at 277 (pertaining to a law that established a hiring preference for veterans, drawing no explicit line between genders but having a disparate impact because more men were being hired as a result).

<sup>90</sup> See *Hayden*, 743 F.3d at 580–81 (discussing whether the school's interests could justify the imposition of this rule on only boys).

<sup>91</sup> *Id.* at 582. But see *Dunham*, 312 F. Supp. at 420 (rejecting under rational basis review the argument that a hair length rule was necessary for team unity, pointing out that there was no evidence that some students' long hair diminished teamwork).

<sup>92</sup> *Hayden*, 743 F.3d at 582. See generally *Virginia*, 518 U.S. at 533 (establishing the "exceedingly persuasive justification" requirement on sex-based classifications). The *Hayden* court noted that its analysis was limited to the stipulated facts. 743 F.3d at 580. Therefore, the inference of discrimination might have been overcome by a showing that the male basketball team's requirement was part of a broader grooming policy that imposed "comparable although not identical" policies on girls' teams. *Id.*

<sup>93</sup> See *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987) (rejecting an Equal Protection challenge to a public school's disallowance of girls wearing tuxedos and boys wearing dresses to the prom on grounds that the school merely required them to conform with community norms without distinguishing on the basis of sex); see also *Richards*, 424 F.2d at 1285–86 (invalidating a hair length requirement under the Due Process Clause, but suggesting that such a challenge would have been unsuccessful in the context of clothing).



challenge dress codes on other legal grounds.<sup>94</sup> In 1973, the Idaho Supreme Court, analyzing a claim under the U.S. Constitution, invalidated a requirement that female students wear skirts or dresses rather than pants.<sup>95</sup> The court characterized personal taste as a constitutionally protected right that required a substantial justification to deprive.<sup>96</sup> At trial, the school called several witnesses to provide evidence that girls wearing pants would have a harmful effect on the educational process, students' morals and respect for authority, and the overall safety at school.<sup>97</sup> There was a significant amount of conflicting testimony offered by the students.<sup>98</sup> Ultimately, the court upheld the trial judge's rejection of the schools' justifications and found that girls wearing pants to school would not endanger, disrupt, or instill poor morals on other students.<sup>99</sup>

In 1969, in *Scott v. Board of Education*, a New York state court evaluating a similar dress code under the U.S. Constitution held that school officials have the authority to control student appearances, but only to the extent it is actually necessary to protect their safety or prevent distractions and interferences in the classroom.<sup>100</sup> The court invalidated the prohibition of girls wearing pants, finding no reasonable relation to health, safety, or education.<sup>101</sup> Although the case was decided based on the scope of the school board's authority, rather than the Equal Protection Clause, the court's reasoning utilized similar concepts, grounding their decision in the fact that the policy applied only to girls and broadly prohibited all types of pants.<sup>102</sup>

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<sup>94</sup> See, e.g., *Johnson v. Joint Sch. Dist.*, 508 P.2d 547, 549 (Idaho 1973) (noting a constitutionally protected right to control one's personal appearance); *Scott v. Bd. of Educ.*, 305 N.Y.S.2d 601, 606 (1969) (finding that a school only had authority to control students' attire to the extent it was necessary to protect students or to prevent disturbances or distractions in school).

<sup>95</sup> *Johnson*, 508 P.2d at 548–49.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 548. In addition to these concerns, the school also argued that school property would be destroyed, the level of familiarity and physical contact between male and female students would increase, and that the overall emotional attitude of the school district would suffer. *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Scott*, 305 N.Y.S.2d at 603.

<sup>101</sup> *Id.* at 606. The court noted that the facts that this requirement prohibited all types of pants and was broadly applied to all girls were an indication that this policy was influenced more by the schoolboard's personal style preferences rather than any sort of concern about student's safety or ability to focus in class. *Id.*

<sup>102</sup> *Id.* In order to illustrate the lack of reasonable relation, the court drew comparisons to some examples that it deemed more acceptable: prohibiting all students who ride bikes from wearing bell-bottoms in the interest of safety, a rule against skin-tight provocative pants in the interest of discipline, or a prohibition of pants with bells attached to them in the interest of maintaining order. *Id.* Moreover, it is worth noting that when providing the example of an acceptable prohibition against tight pants, the court characterized the type of pants to be ones that are so revealing that they "provoke or distract students of the opposite sex," and did not in any way imply that the rule would only apply to females. *Id.*

Disputes over clothing requirements after 1996, though sparse, appear to be more consistent with gender-discrimination Equal Protection jurisprudence.<sup>103</sup> In the 2019 case before the U.S. District Court of the Eastern District of North Carolina, *Peltier v. Charter Day School Inc.*, a group of three students sued a North Carolina public charter school alleging an Equal Protection violation.<sup>104</sup> The alleged violation stemmed from the school's uniform policy requiring girls to wear skirts or jumpers rather than pants or shorts.<sup>105</sup> In analyzing the Equal Protection claims, the court cited to *Hayden* on numerous occasions, thereby indicating its intent to take a similar approach that the Seventh Circuit did to hair length regulations.<sup>106</sup> The plaintiffs argued that the uniform reinforced outdated sex stereotypes and imposed an unequal burden on them by making them colder and less comfortable, restricting their freedom of movement, preventing them from engaging in various physical activities at

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<sup>103</sup> See, e.g., *Peltier*, 384 F. Supp. 3d at 595–97 (denying a motion for summary judgment on an Equal Protection claim against a school dress code requiring female students to wear skirts or jumpers). One court, for example, denied a motion to dismiss an Equal Protection challenge to a yearbook policy requiring male students to wear tuxedos and female students to wear drapes. *Sturgis*, 2011 U.S. Dist. LEXIS 105065, at \*4–6. The court did so in order to allow more facts to be developed so that it could ascertain whether the policy was facially discriminatory, or, as the school contended, facially neutral in order to determine whether intermediate scrutiny applied. *Id.* (citing *Feeney*, 442 U.S. at 273). The court noted that if the policy was truly gender neutral, more facts were required in order to ascertain the extent to which the policy affected and burdened students. *Id.* On the other hand, if the policy was found to be facially discriminatory, then the school needed to offer a justification that would be deemed valid under intermediate scrutiny. *Id.* at \*3–5 (citing *Virginia*, 518 U.S. at 533). Meanwhile, another court rejected an Equal Protection claim when the dress code was facially gender-neutral and the complaint lacked allegations of discriminatory intent. *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621, 623, 628 (W.D. Ky. 2000), *aff'd*, 21 Fed. App'x 252 (6th Cir. 2001) (citing *Feeney*, 442 U.S. at 274) (evaluating a dress code that regulated the permissible styles, colors, and logos of clothing, jewelry, and shoes, which the school contended was meant to prevent displays of gang affiliation, reduce violence and bullying amongst students, and enable people to identify non-student intruders).

<sup>104</sup> *Peltier*, 384 F. Supp. 3d at 584–85.

<sup>105</sup> *Id.* The school also regulated the types and amount of jewelry that girls could wear but prohibited boys from wearing any jewelry. *Id.* at 586 n.3. Moreover, although the only hair regulation imposed on girls was a prohibition against “excessive or radical haircuts and colors,” which also was imposed on boys, boys also had to keep their hair “neatly trimmed” and follow certain hair-length requirements. *Id.* The plaintiffs, however, only challenged the uniform policy prohibiting girls from wearing pants or slacks. *Id.* at 587. Moreover, there were several exceptions to the uniform requirement. *Id.* For example, students were not required to adhere to the uniform policy for certain types of class trips and as a reward for certain types of encouraged behavior. *Id.* Students were also allowed to wear school-approved athletic clothing on days in which they attended physical education class. *Id.*

<sup>106</sup> See *id.* at 595–97 (discussing the Equal Protection claim); see also *Hayden*, 743 F.3d at 582 (finding a school athletic code's hair length policy unconstitutional under the Equal Protection Clause because it applied only to the boys' baseball team and not girls and lacked an exceedingly persuasive justification for the differential treatment). The *Peltier* court interpreted the *Hayden* court's specific standard of analysis to slightly differ from *Virginia*'s intermediate scrutiny, characterizing *Hayden*'s analysis as a “comparable burdens standard.” *Peltier*, 384 F. Supp. 3d at 596 (internal quotations omitted). Because the *Peltier* court found that the dress code rule in question failed both tests, however, it passed on the question of whether one or both standards would apply. *Id.* Regardless, the court drew guidance from *Hayden* throughout the Equal Protection analysis. *Id.* at 596–97.

recess, and disrupting and limiting their learning opportunities.<sup>107</sup> The defendants pointed to the fact that the school was heavily focused on instilling traditional values in students and argued that this requirement, along with the other uniform rules, contributed to this mission.<sup>108</sup> Though they did not point to any specific connection between girls wearing skirts and the fulfillment of their goal, the defendants argued that all of the requirements functioned together to achieve this goal.<sup>109</sup> Moreover, they argued that the sex-differentiated requirements in the uniform policy facilitated appropriate interactions between members of the opposite sex.<sup>110</sup> The court rejected the defendants' arguments, however, pointing to the fact that this rule was inconsistent with community norms and that there was no evidence that it fulfilled its purported purpose.<sup>111</sup> Ultimately, because the school was unable to justify a sex-specific requirement that made girls uncomfortable, prevented them from participating in the same activities as boys, and distracted them during class, the court found that the skirt requirement was a violation of the Equal Protection Clause.<sup>112</sup>

### 3. Jewelry Cases

In addition to clothing and hair requirements, there have been a number of challenges to school prohibitions on males wearing earrings.<sup>113</sup> In 1987,

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<sup>107</sup> *Peltier*, 384 F. Supp. 3d at 587, 597. The skirts distracted the female students by making them have to pay close attention to their leg placement while sitting in class. *Id.* at 587. Moreover, it caused them to refrain from certain athletic activities during recess because they worried that they would inadvertently expose themselves. *Id.* The plaintiffs had also testified that skirts, rather than pants, were less comfortable for them and that they made them colder in the winter. *Id.* Ultimately, the plaintiffs felt as if these effects of the skirt requirement indicated to them that their "comfort and freedom to engage in physical activity are less important than those of their male classmates." *Id.*

<sup>108</sup> *Id.* at 587, 596.

<sup>109</sup> *Id.* at 587–88, 596.

<sup>110</sup> *Id.* at 596. More specifically, the defendants argued that the "visual cues" of the skirts facilitated respect between boys and girls. *Id.*

<sup>111</sup> *Id.* The court acknowledged that sex-differentiated dress requirements might be constitutional if they were consistent with community standards, but noted the widespread commonality of girls and women wearing pants in today's society. *Id.* Moreover, the court pointed to the fact that there were several circumstances that regularly led to a temporary lapse of the skirt requirement and that there was no evidence that students of the opposite sex acted differently towards each other during those times. *See id.* (discussing the frequency of physical education classes, special occasions, and field trips, all of which led to girls being allowed to wear pants). When the school board members were deposed, they were unable to explain why the skirt requirement contributed to the school's general mission. *Id.*

<sup>112</sup> *Id.* at 597. The court also noted that the defendants were unable to prove that the policy imposed comparable burdens on male students. *Id.* Although boys had certain sex-specific rules, such as a requirement that they wear belts, there was no proof that this rule had a similar burdensome effect on male students. *See id.* ("[T]he skirts requirement causes the girls to suffer a burden the boys do not, simply because they are female.").

<sup>113</sup> *See, e.g., Olesen v. Bd. of Educ.*, 676 F. Supp. 820 (N.D. Ill. 1987); *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330 (Ind. Ct. App. 1995); *Jones v. W.T. Henning Elem. Sch. Principal*, 721 So. 2d 530 (La. Ct. App. 1998).

before the U.S. District Court of Northern Illinois in *Olesen v. Board of Education*, a male high school student brought suit after being suspended from school multiple times for wearing an earring.<sup>114</sup> The school enacted the prohibition against boys wearing earrings after discovering that related gang activity led to violence, intimidation, and attempted recruitment within the school.<sup>115</sup> In order to address the problem, the school created a gang policy that not only banned earrings worn by male students, which the school administration believed to be symbolic of gang affiliation, but also banned any sort of gang symbolism in students' clothing, speech, and behavior.<sup>116</sup> The court upheld the school's policy, reasoning that the school board had a legitimate interest in curtailing gang activity.<sup>117</sup> The school proved that earrings tended to symbolize gang membership when boys wore them, whereas girls symbolized membership differently.<sup>118</sup> There was therefore a close enough relationship between the classification and the school's interest.<sup>119</sup>

In 1995, in *Hines v. Caston School Corp.*, the Indiana Court of Appeals found that an elementary school's suspension of a fourth-grade boy for wearing earrings was acceptable under the U.S. Constitution.<sup>120</sup> The court noted that the policy prohibited all students from wearing jewelry that was inconsistent with community norms and that there was evidence that boys wearing earrings was in fact abnormal in the community.<sup>121</sup> Because the school had a

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<sup>114</sup> *Olesen*, 676 F. Supp. at 821.

<sup>115</sup> *Id.* at 821–22.

<sup>116</sup> *Id.* The school board had enacted several rules prohibiting gang activity and demonstrations of affiliation, but left room for the schools within the district to implement their own rules as well. *Id.* at 822. The school that the plaintiff attended prohibited male students wearing earrings because they found that many male students wore earrings to symbolize their gang affiliations. *Id.*

<sup>117</sup> *Id.* at 823 (noting the school's interest in student wellness and safety and comparing this situation to hair length cases in which schools were unable to provide a rational basis for their requirements). The court also noted that unlike hair length requirements, which affect students both in and out of school, a ban on jewelry does not affect one's ability to control their appearance outside of school. *Id.* It should be noted that the court's comparison of this case to those regarding hair length requirements took place during its discussion of First Amendment claims, which are subject to a greater level of scrutiny than Equal Protection gender discrimination claims. *Id.* at 822–23; see Harbach, *supra* note 58, at 1053 (noting that First Amendment challenges are typically analyzed under strict scrutiny).

<sup>118</sup> *Olesen*, 676 F. Supp. at 823 (noting that the ways in which girls typically symbolized gang affiliation were also banned under the dress code).

<sup>119</sup> See *id.* (noting that the school demonstrated that earrings on boys were indicative of gang affiliation).

<sup>120</sup> *Hines*, 651 N.E.2d at 335–36.

<sup>121</sup> See *id.* (referring to evidence that the town was “politically and religiously conservative” and earrings were regarded as feminine within the community). Although the elementary school's policy was gender neutral, it was written after the plaintiff was already reprimanded for wearing earrings to school. *Id.* at 331. The school had originally informed the boy's parents that his earrings were a violation of the school's dress code because, although the elementary school had no written dress code, it was on the same campus as the district's middle and high school, which specifically prohibited males from wearing earrings. *Id.* The boy continued wearing his earring to school with no consequence until

legitimate interest in enforcing community norms as a means of teaching discipline, the court found no violation of Equal Protection.<sup>122</sup> Moreover, while discussing Due Process claims, the court rejected a number of justifications despite these claims being subject to a lesser degree of scrutiny.<sup>123</sup> Specifically, the court rejected the argument that the rule prevented gangs, cults, and homosexuality, reasoning that there was no evidence of a correlation between male earrings and these activities, nor evidence that such activities were present in the school.<sup>124</sup> Furthermore, the school's argument that the rule was necessary for boys' safety in gym class failed because female students were allowed to wear earrings and were able to prevent injury by simply taking their earrings out.<sup>125</sup> Similarly, in 1998 in *Jones v. W.T. Henning Elementary School Principal*, the Louisiana Court of Appeals upheld a specific ban on male earrings in an elementary school, finding persuasive justification in three legitimate school objectives: preventing class distraction, instilling respect for authority, and encouraging conformation to community norms.<sup>126</sup> The court noted that the main purpose of a school is to educate their students and that this could not be achieved when there was a lack of discipline and order.<sup>127</sup> Moreover, the school was able to provide proof that male earrings were distracting in elementary schools because it was so uncommon, and the court accepted the proposition that the rule reflected the community's values.<sup>128</sup>

## II. TAKE-AWAYS FROM DRESS CODE LITIGATION: WHEN DO THEY VIOLATE EQUAL PROTECTION?

In order to analyze the validity of a dress code under the Equal Protection Clause, courts must first ascertain what level of scrutiny is warranted.<sup>129</sup> In

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the following school year when the school board added a provision to the elementary school handbook requiring that students only wear jewelry that conforms with community standards. *Id.* After this, he again continued to wear earrings to school and, ultimately, his refusal to comply with the newly enacted dress code resulted in his temporary suspension from school. *Id.*

<sup>122</sup> See *id.* at 336 (noting that this method of instilling discipline is a "legitimate educational function").

<sup>123</sup> See *id.* at 334–35 (applying rational basis review to the claim that students have a liberty interest in controlling their personal appearances).

<sup>124</sup> See *id.* at 335 (noting that a member of the schoolboard conceded that he did not know of any gang or homosexual activity in the school and that he did not think that earrings were always associated with male gang activity).

<sup>125</sup> *Id.*

<sup>126</sup> *Jones*, 721 So. 2d at 532.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *Sturgis v. Copiah Cty. Sch. Dist.*, 2011 U.S. Dist. LEXIS 105065, at \*5–6 (S.D. Miss. Sept. 15, 2011) (demonstrating that the level of scrutiny applied in the analysis would depend on whether the facts support a finding of there being a gender-based classification). See generally *United States v. Virginia*, 518 U.S. 515, 533 (1996) (finding that heightened scrutiny is required when analyzing a law that makes a classification on the basis of sex).

other words, courts must first determine whether an analysis of the dress code requires heightened scrutiny in that the dress code contains either a sex-based classification or a policy with an intentionally disparate impact.<sup>130</sup> If heightened scrutiny is triggered, then the requirements set forth in *United States v. Virginia* must be met—there must be an exceedingly persuasive justification with a substantial connection to the sex-based classification.<sup>131</sup> Section A of this Part elaborates on the circumstances in which heightened scrutiny may be triggered.<sup>132</sup> Section B discusses the various justifications that have been deemed sufficiently persuasive and the extent to which a substantial connection must be proven.<sup>133</sup>

### A. The Preliminary Step: Arriving at Heightened Scrutiny

When a law or policy does not make an explicit sex-based distinction, it may nevertheless be subject to an Equal Protection challenge.<sup>134</sup> In these cases, courts must ascertain whether the policy is gender neutral or whether it is implicitly based on gender.<sup>135</sup> If it is genuinely gender neutral, courts must then determine if the law nevertheless has a disproportionate impact on one gender in a way that reflects intentional gender discrimination.<sup>136</sup> A policy will be deemed invalid if there is a finding of purposeful discrimination, in that the disproportionate effects on one gender were an intended result of the policy.<sup>137</sup> Thus, dress code rules that apply either identical or comparable rules to male and female students are unlikely to receive heightened scrutiny unless they are found to have an intentionally disproportionate impact on one gender.<sup>138</sup> Con-

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<sup>130</sup> See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) (holding that laws will require exceedingly persuasive justifications if they are “overtly or covertly” based on sex); *Sturgis*, 2011 U.S. Dist. LEXIS 105065, at \*6 (noting that even if the policy in question is found to be gender neutral, it will still require intermediate scrutiny if there is a finding of discriminatory intent).

<sup>131</sup> See *Virginia*, 518 U.S. at 533 (articulating the standard of analysis for sex-based classifications under the Equal Protection Clause).

<sup>132</sup> See *infra* notes 134–150 and accompanying text.

<sup>133</sup> See *infra* notes 151–175 and accompanying text.

<sup>134</sup> See *Feeney*, 442 U.S. at 259 (analyzing a Massachusetts law that gave hiring preferences to veterans for public service positions).

<sup>135</sup> See *id.* at 274 (describing the analytical framework for gender neutral laws, which consists of a two-step inquiry into, first, whether the law is genuinely gender neutral and, second, whether it reflects intentional discrimination).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 274, 279.

<sup>138</sup> See *id.* at 274 (noting that a disproportionate impact will only be unconstitutional if it is found to be intentional); *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621, 628 (W.D. Ky. 2000) (rejecting Equal Protection challenges because the law was facially neutral), *aff'd* 21 Fed. App'x 252 (6th Cir. 2001); see also *Sturgis*, 2011 U.S. Dist. LEXIS 105065, at \*3–7 (denying a motion to dismiss an Equal Protection claim against a school's yearbook policy requiring boys to wear tuxedos and girls to wear skirts (citing *Feeney*, 442 U.S. at 273)); *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987) (upholding a school dance dress policy because it applied equally to males and fe-

versely, if the dress code is facially gender neutral, yet implicitly based on gender, it will be treated as if it has made a classification on the basis of sex and will therefore receive heightened scrutiny.<sup>139</sup>

In 2000 before the U.S. District Court for the Western District of Kentucky, in *Long v. Board of Education*, the dress code at issue regulated the permissible styles, colors, and logos of clothing as well as the types of jewelry and shoes.<sup>140</sup> The dress code was enacted in order to increase student safety after school administrators noticed a number of problems caused by student attire, including gang affiliation and bullying.<sup>141</sup> The court noted that this was a gender neutral code and that in order to prevail on an Equal Protection challenge, the plaintiffs would have to prove a disparate impact and intentional discrimination.<sup>142</sup> Because there were no allegations of discriminatory intent, the court rejected the Equal Protection claim.<sup>143</sup> Similarly, in a 1987 case, *Harper v. Edgewood Board of Education*, the U.S. District Court for the

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males by requiring all students to dress in accordance with community norms). The Supreme Court has noted that a policy's foreseeably inevitable harmful impact on one gender creates a strong inference that it was intentional. *Feeney*, 442 U.S. at 279 n.25. In *Sturgis*, the school argued that the dress code was gender neutral because both boys and girls were required to wear certain items of clothing. 2011 U.S. Dist. LEXIS 105065, at \*4. The plaintiffs, on the other hand, asserted that the fact that there is a specific requirement imposed on each gender indicated that the policy had a facial gender classification. *Id.* The court noted that both arguments had some merit, but that more facts were needed in order to ascertain the actual wording of the policy. *Id.* at \*4, \*6 n.2 (noting that the policy was not in writing). Lastly, the court observed that if the policy was gender neutral, then the facts would have to be considered under the framework of *Personal Administrator of Massachusetts v. Feeney*. *Id.* at \*6–7. See generally *Feeney*, 442 U.S. at 274 (setting forth the framework for analyzing gender neutral policies).

<sup>139</sup> See *Feeney*, 442 U.S. at 274 (discussing the first step of the gender-neutral analysis that seeks to ascertain whether the law is, in fact, genuinely gender neutral and not implicitly gendered). Some schools with facially gender-neutral dress codes have given students and parents the impression of being implicitly based on gender when, for example, the list of prohibited clothing items contains only clothing that is traditionally worn by girls. See Finan, *supra* note 11 (noting that most of the banned clothing in the dress code was aimed at what female students would wear and that in 2016–2017 every student suspended for violating the dress code was female and in the following year, 60% were female); see also *Dress Code*, AUSTIN INDEP. SCH. DIST., <https://www.austinisd.org/family-support/dress-code> [<https://perma.cc/SQZ8-PCG5>] (prohibiting clothing such as halter tops and spaghetti straps). Another school faced similar criticism for showing students a video that purported to teach them about dress code violations in which only female students were featured. See Monica Hernandez, *Principal Apologizes After 'Sexist' Dress Code Video Upsets Parents, Students*, WFAA-TV (Aug. 17, 2018), <https://www.wfaa.com/article/news/principal-apologizes-after-sexist-dress-code-video-upsets-parents-students/287-585257109> [<https://perma.cc/4RHA-RBV5>].

<sup>140</sup> *Long*, 121 F. Supp. 2d at 623. For example, the dress code required that all button-down shirts be buttoned from the top button down, a solid color with no logos, and be made of cotton or a cotton blend. *Id.* at 629. Similarly, pants were required to be either khaki-colored or black, have a visible belt, and be worn at the waist. *Id.*

<sup>141</sup> *Id.* at 623 (listing the safety goals of the dress code as eliminating the display of gang affiliation, preventing violence and bullying based on students' clothing, and enabling people to identify non-student intruders).

<sup>142</sup> *Id.* at 628 (citing *Feeney*, 442 U.S. at 274).

<sup>143</sup> *Id.*

Southern District of Ohio rejected an Equal Protection challenge when a high school ejected two students from the prom because the male student wore a dress and the female wore a tuxedo.<sup>144</sup> The court reasoned that the school's dress code made no classification on the basis of sex; it merely required all students to conform to community norms.<sup>145</sup>

Moreover, a school may be able to impose facially different requirements on boys and girls if they are similar in nature.<sup>146</sup> For example, in the 2014 case, *Hayden v. Greensburg Community School Corp.*, the U.S. Court of Appeals for the court overturned a short hair requirement on a boys' basketball team, but noted that the school might have prevailed had they shown that their requirement was part of a broader policy that imposed similar requirements on girls' teams.<sup>147</sup>

Lastly, a policy need not affect every single member of one sex in order for it to be viewed as making a distinction on the basis of sex.<sup>148</sup> In *Hayden*, for example, it was enough that a short hair requirement was imposed on a boys' sports team, but not the girls' equivalent, regardless of the fact that other boys' teams had no such rule.<sup>149</sup> Therefore, when a requirement is imposed on only some members of one gender, it is still likely to be treated as having an explicit gender classification regardless of how many people within the gender it affects.<sup>150</sup>

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<sup>144</sup> *Harper*, 655 F. Supp. at 1354, 1356.

<sup>145</sup> *Id.* But see *Sturgis*, 2011 U.S. Dist. LEXIS 105065, at \*3–7 (denying a motion to dismiss a challenge to a yearbook photo requirement that males wear tuxedos and females wear drapes because both the plaintiff's argument that the policy constituted sex stereotyping and the defendant's argument that the policy was sex-neutral had merit).

<sup>146</sup> See *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 580–81 (7th Cir. 2014) (discussing the possibility of schools prevailing when there is an equal burden).

<sup>147</sup> *Id.* at 580. More specifically, the court noted that they had limited facts in the record to review and that they lacked information about the full scope of the school's policies. *Id.* Had they been able to review the whole policy, it would have been possible, though not definite, that it would have been acceptable. See *id.*; see also *Peltier v. Charter Day Sch., Inc.*, 384 F. Supp. 3d 579, 597 (E.D.N.C. 2019) (finding a prohibition on girls wearing pants to be unconstitutional and noting that there were no comparably burdensome rules on boys).

<sup>148</sup> See *Hayden*, 743 F.3d at 582 (finding a hair-length requirement to be unconstitutional when it applied to two boys' sports teams, despite the fact that the other boys' sports teams had no such requirement imposed on them).

<sup>149</sup> See *id.* at 579 (rejecting the school's argument that the fact that only boys who sought to play basketball or baseball had to cut their hair meant that the classification was based on boys' desired athletic activities rather than gender).

<sup>150</sup> See *id.* (finding the policy in question to be one that "draws an explicit gender line" and thus not requiring the showing of intentional discrimination that is needed in cases of gender-neutral policies).



*B. Acceptable School Justifications and their Connections  
to the Gender-Based Classifications*

Once it has been determined that heightened scrutiny is warranted, schools bear the burden of providing an exceedingly persuasive justification that bears a substantial relation to the sex-based classification.<sup>151</sup> The health and safety of students are generally acceptable school interests, provided that schools prove why that interest is best served by imposing a requirement on only one gender.<sup>152</sup> As a result, it would be acceptable for a school to seek to prevent injury during sports practice or gym class by making sure that all students are keeping their hair out of eyes or preventing them from wearing jewelry.<sup>153</sup> At the same time, courts have made it clear that these justifications will not support a sex-based classification if the potential safety risk is equally hazardous to the other gender.<sup>154</sup> Consequently, if girls can avoid injury in gym class without adhering to the requirement imposed on boys, for example by tying their hair back or removing their jewelry, then the policy is likely lacking the requisite relation between the school's interest and the classification.<sup>155</sup> Moreover, the safety concern must be genuine.<sup>156</sup> In *Hines v. Caston School Corp.*, the court questioned the genuineness of the school's concern about boys sustaining injuries during gym class because of their earrings.<sup>157</sup> These injuries were clearly avoidable without requiring a prohibition on boys wearing earrings, as demonstrated by the fact that girls avoided them by taking their ear-

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<sup>151</sup> See *Virginia*, 518 U.S. at 533 (articulating the standard of analysis for sex-based classifications).

<sup>152</sup> See *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 335 (Ind. Ct. App. 1995) (rejecting a safety justification for a male earring ban due to evidence that female students were able to wear earrings and avoid injuries); *Scott v. Bd. of Educ.*, 305 N.Y.S.2d 601, 606 (1969) (accepting a school's general authority to impose dress requirements that protect students' safety but finding that the authority did not allow the school to prohibit girls from wearing pants rather than skirts); see also *Olesen v. Bd. of Educ.*, 676 F.Supp. 820, 823 (N.D. Ill. 1987) (finding a school's interest in ensuring the safety and overall well-being of their students by seeking to minimize gang activity to be a rational basis for the prohibition of males wearing earrings).

<sup>153</sup> See *Hayden*, 743 F.3d at 580 (discussing the school's desire to keep boys' hair out of their faces while playing basketball); *Hines*, 651 N.E.2d at 334 (noting the school's argument that earrings may cause injury in gym class).

<sup>154</sup> See *Hayden*, 743 F.3d at 580–81 (invalidating a hair length requirement imposed on boys when the safety justification was equally applicable to girls); *Hines*, 651 N.E.2d at 335 (finding the school's proffered safety justification to be invalid because it did not support the distinction between males and females).

<sup>155</sup> See *supra* note 154 and accompanying text.

<sup>156</sup> See *Hines*, 651 N.E.2d at 335 (expressing doubt as to whether safety was a genuine motivation behind the school's ban on boys wearing earrings); *Scott*, 305 N.Y.S.2d at 606 (finding that a ban on girls wearing pants appeared to be driven more by style preference than safety).

<sup>157</sup> *Hines*, 651 N.E.2d at 335. The school argued that boys were more likely to roughhouse during gym class than girls and thus more likely to be injured when wearing earrings. *Id.* at 334. The court rejected this contention, however, because boys could just as easily take their earrings out before class. *Id.* at 335.

rings out before that class.<sup>158</sup> Similarly, in 1969, in *Scott v. Board of Education*, a New York state court analyzing a claim under the United States Constitution found that a proscription of girls wearing any type of slacks had no relationship to students' safety.<sup>159</sup> The court pointed to the irrationality of the fact that the rule applied only to females and prohibited all types of pants.<sup>160</sup> In doing so, the court compared the rule to a hypothetical one that prohibited any student who rides a bike from wearing bellbottomed pants as a means of showing when safety is actually a genuine concern.<sup>161</sup>

The prevention of classroom distractions has also been an acceptable school interest provided, again, that there is a sufficient connection between the policy and the concern about disruption.<sup>162</sup> The *Scott* court invalidated a school's requirement that girls wear dresses or skirts under a standard of review that required only a reasonable relationship to the prevention of distraction, rather than a substantial connection.<sup>163</sup> The court found an insufficient link between a broad prohibition of girls wearing pants and the goal of preventing distraction.<sup>164</sup> In doing so, the court discussed hypothetical examples of rules that would bear a sufficient relationship, those being a ban on clothing worn by either gender if it made noise or was overly provocative to the other gender.<sup>165</sup> Moreover, the extent to which the proscribed clothing or appearance is inconsistent with trends or uncommon within the community may, at least in part, play a role in the likelihood of this justification succeeding, as it makes it more likely that the clothing will be distracting.<sup>166</sup>

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<sup>158</sup> *See id.* at 335.

<sup>159</sup> *Scott*, 305 N.Y.S.2d at 606. Although this case was not decided on Equal Protection grounds, the court's reasoning contemplates Equal Protection concerns. *See id.* (finding no reasonable relationship because the rule was only applied to female students).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See Jones v. W.T. Henning Elem. Sch. Principal*, 721 So. 2d 530, 532 (La. Ct. App. 1998) (noting that schools cannot fulfill their educational purposes when there is too much disruption); *Scott*, 305 N.Y.S.2d at 606 (finding that the prevention of classroom distraction is a legitimate school interest but limiting the school's authority to regulate clothing only to the extent that is actually necessary to prevent distraction); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (noting that the First Amendment does not protect student conduct if it "materially disrupts classwork or involves substantial disorder"); *Peltier*, 384 F. Supp. 3d at 596 (rejecting an argument that a uniform requiring girls to wear skirts instead of pants helps maintain classroom order because the defendants failed to demonstrate how the policy actually fulfilled that goal).

<sup>163</sup> *Scott*, 305 N.Y.S.2d at 606.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See Jones*, 721 So. 2d at 532 (discussing the need for teachers to maintain classroom focus). The court here found that a school's distraction justification was sufficiently connected to its prohibition of boys wearing earrings, pointing to the fact that it was uncommon for boys to wear earrings in elementary schools. *Id.* Because this was a rare occurrence, the court noted, it was more likely to distract other students and could therefore be prohibited. *See id.* (upholding prohibition of male earrings).

A school's desire to instill morals, discipline, and a sense of respect in students has also been deemed a legitimate interest that may be served by requiring student attire to comply with community norms.<sup>167</sup> The extent to which schools must prove a connection is not entirely clear, however, as several courts that have discussed this justification have only done so briefly.<sup>168</sup> The *Hines* court discussed the matter in more detail and upheld a ban on boys wearing earrings because they were inconsistent with community norms.<sup>169</sup> The court reasoned that the school was justified in seeking to instill community values and pointed to specific evidence of the conservative nature of the community to demonstrate that it was, in fact, inconsistent with norms.<sup>170</sup> Conversely, an Idaho state court found that the interest of instilling good morals on students did not justify a requirement that girls wear skirts or dresses because it found no link between girls wearing pants and bad morals.<sup>171</sup>

There are a number of other justifications that courts have acknowledged to be legitimate interests provided that there is a sufficient relationship between the school's interest and dress code policy.<sup>172</sup> For example, a school may

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<sup>167</sup> See *Hines*, 651 N.E.2d at 335–36 (noting evidence that encouraging conformity to community norms discourages rebelliousness); *Jones*, 721 So. 2d at 532 (finding that a school's desire to instill respect is a legitimate interest that may be served by enforcing community norms); *Scott*, 305 N.Y.S.2d at 606 (noting the school's authority to enforce dress policies for the purpose of instilling discipline). A school's desire to instill discipline by enforcing a dress code that is inconsistent with community norms, however, is unlikely to be accepted. See *Peltier*, 384 F. Supp. 3d at 595–97 (overturning a uniform policy that was inconsistent with community norms and rejecting the defendants' argument that the policy helped instill discipline). In *Peltier*, the court found a uniform policy to be unconstitutional when it required female students to wear skirts rather than pants, noting specifically that the requirement was inconsistent with community norms. *Id.* at 596 (noting that women have been allowed to wear pants since the 1970s). The school argued that the policy helped instill discipline and promoted appropriate and respectful interactions between male and female students. *Id.* In rejecting this argument, the court relied primarily on the lack of evidence that this goal was served by the rule and the lack of evidence that such a rule was consistent with norms within that county or state. *Id.* at 597.

<sup>168</sup> See *Jones*, 721 So. 2d at 532 (accepting the community norms justification without discussing the specific proof of what these norms were); *Scott*, 305 N.Y.S.2d at 606 (finding that a prohibition against girls wearing pants did not reasonably relate to discipline simply because the policy applied to only females and did not specify the type of pants prohibited, without discussing any arguments made by the school).

<sup>169</sup> *Hines*, 651 N.E.2d at 335–36.

<sup>170</sup> *Id.*; see *Jones*, 721 So. 2d at 532 (finding that a school's enforcement of community values was a legitimate and justifiable means of instilling discipline and respect for authority and upholding a ban on boys' earrings without citing to evidence as to how this ban defied these values).

<sup>171</sup> See *Johnson v. Joint Sch. Dist.*, 508 P.2d 547, 548–49 (Idaho 1973) (upholding the trial court's finding that girls wearing pants did not instill bad morals under rational basis review within the context of the Due Process Clause); see also *Peltier*, 384 F. Supp. 3d at 596–97 (finding no evidence that requiring females to wear skirts helped promote discipline and respect and noting that the rule was inconsistent with community norms).

<sup>172</sup> See *Hayden*, 743 F.3d at 582 (discussing school interest in having their athletic teams present an appearance of unity); *Olesen*, 676 F. Supp. at 823 (accepting school interest in curtailing gang activity); *Hines*, 651 N.E.2d at 335 (discussing school interest in curtailing gang activity); see also

be justified in seeking an appearance of unity in their sports teams, but such a desire is equally applicable to boys' and girls' teams and would not support imposing an appearance requirement on only the boys' teams.<sup>173</sup> Similarly, curtailing gang activity has often been an accepted justification for preventing boys from wearing earrings when the school proves that they have a genuine concern about gang activity and that earrings are only symbolic of gang affiliation when worn by boys.<sup>174</sup> Meanwhile, this justification may fail when there is no proof of gang activity within the community nor links between gang affiliation and boys wearing earrings.<sup>175</sup>

### III. A MODERN ANALYSIS OF DRESS CODE JURISPRUDENCE

Although a number of courts in the past found that gender-based disparate dress or appearance requirements did not fall within the scope of the Equal Protection Clause, many of these decisions came from the 1960s and 1970s, when sex-discrimination Equal Protection jurisprudence had either not yet been established or was still in its early stages.<sup>176</sup> Given this fact, as well as the Supreme Court's indication that new societal points of view can be relevant, courts are likely to be more willing to hear these types of Equal Protection challenges today.<sup>177</sup>

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*Peltier*, 384 F. Supp. 3d at 596 (noting the school's proffered justification in promoting appropriate conduct between members of the opposite sex, but declining to explicitly decide whether this would be an acceptable justification because, "even assuming these are legitimate goals," the defendants failed to offer proof that they were being served).

<sup>173</sup> See *Hayden*, 743 F.3d at 582 (finding that the desire to look unified did not support the disparate hair length imposition on the boys' basketball team because there was no evidence that the school sought a similar image for the girls' teams or other boys' sports teams).

<sup>174</sup> See *Olesen*, 676 F. Supp. at 821, 823 (accepting the school's justification that the ban on earrings was for the purpose of curtailing gang activity). Here, the school was able to prove that they had a significant number of problems with gang activity and offered evidence that boys wearing earrings symbolized gang affiliation but that girls wearing earrings did not. *Id.* at 822–23.

<sup>175</sup> See *Hines*, 651 N.E.2d at 335 (rejecting the school's gang-related justification because of insufficient evidence).

<sup>176</sup> See *United States v. Virginia*, 518 U.S. 515, 532 (1996) (noting that the Court first accepted a sex-discrimination Equal Protection argument in 1971); see, e.g., *King v. Saddleback Junior Coll. Dist.*, 445 F.2d 932, 939 (9th Cir. 1971) (finding gender-based differential treatment to pose no problem under the Equal Protection Clause). Moreover, even after the Supreme Court recognized gender-based classifications as falling under the Equal Protection Clause, the level of scrutiny that the Court applied was inconsistent, which added more uncertainty to the weight of the earlier dress code cases. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (mandating strict scrutiny); *Reed v. Reed*, 404 U.S. 71 (1971) (applying rational basis review).

<sup>177</sup> See *supra* note 50 and accompanying text (discussing federal courts' consideration of new societal insights in Equal Protection analyses). See generally *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (acknowledging the role that evolving societal views play in Equal Protection cases (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015))); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 669 (1966) (noting that the definition of equality can change over time as it is not bound by ideas of the past).

When schools are able to point to a comprehensive dress policy that imposes comparable rules on both genders, they are likely to defeat an Equal Protection challenge provided that the requirements are gender neutral or equally burdensome.<sup>178</sup> When a policy either is gender-neutral but unevenly enforced<sup>179</sup> or contains an explicitly gendered classification, a school will be required to point to a valid objective, such as students' well-being, focus, or morality.<sup>180</sup> Courts will only find the justification to be sufficiently related to the classification if the school can offer proof that it is based on genuine concerns.<sup>181</sup>

Given the commonly held view that it is the job of school officials, not of judges, to decide the best ways to implement educational policies, it is possible that some deference would be given to a school's proffered justification for their dress codes.<sup>182</sup> At the same time, courts have made it clear that this policy does not give school officials free reign over their students and that they will

<sup>178</sup> See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (setting forth the standard of analysis for gender-neutral policies); *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 581 (7th Cir. 2014) (discussing the possibility that comprehensive dress codes may be more likely to withstand scrutiny under the Equal Protection Clause); *Long v. Bd. of Educ.*, 121 F. Supp. 2d 621, 628 (W.D. Ky. 2000), *aff'd* 21 Fed. App'x 252 (6th Cir. 2001), (applying the framework for analyzing gender-neutral laws and upholding the dress code due to insufficient showing of intentional discrimination).

<sup>179</sup> See *Feeney*, 442 U.S. at 274 (noting that facially gender-neutral laws may still "covert[ly]" be made with gender in mind); see also *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 335–36 (Ind. Ct. App. 1995) (applying intermediate scrutiny to a gender-neutral dress code that required that students' jewelry conform with community standards when one such standard was that boys generally do not wear earrings).

<sup>180</sup> See *supra* notes 151–175 and accompanying text (discussing the various justifications that courts have accepted and the requisite relationship between the school's objective and the sex-based classification employed).

<sup>181</sup> See *supra* notes 151–175 and accompanying text.

<sup>182</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (expressing the Supreme Court's view that school officials, not judges, take on the role of educating children); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (noting that school officials need sufficient authority over students in order to properly educate them); *Hayden*, 743 F.3d at 582 (noting that schools are given flexibility in order to fulfill their educational responsibilities); *Peltier v. Charter Day Sch., Inc.*, 384 F. Supp. 3d 579, 595 (E.D.N.C. 2019) (discussing courts' hesitation to interfere with everyday educational issues but noting that students nevertheless have constitutional rights that must be protected). See generally *supra* notes 58–64 and accompanying text (discussing the Supreme Court's approach to school authority and constitutional issues). This is because the Court has consistently emphasized that school administrators possess a certain expertise in educational matters, which judges lack. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371 n.1 (2009) (noting in the context of the Fourth Amendment that school administrators should be able to prescribe behavioral standards for students without interference from courts); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 (1982) (noting that courts do not have the expertise to address educational policies); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (expressing concern about judicial intervention in schools' day-to-day matters).

step in when necessary to protect students' constitutional rights.<sup>183</sup> Consistent with this notion and with sex-discrimination Equal Protection jurisprudence, courts reviewing school dress codes have, in fact, taken close looks at schools' justifications in order to ensure that they are genuine.<sup>184</sup>

Section A of this Part applies the standard and guidance set forth in *United States v. Virginia* and subsequent Supreme Court cases to earlier challenges to dress codes.<sup>185</sup> Section B argues that, given the progression of the Supreme Court's Equal Protection jurisprudence, the notion that restrictive dress codes imposed on girls are necessary to prevent classroom distraction may no longer suffice to justify a sex-based classification.<sup>186</sup>

### *A. Re-Examining Older Cases in Light of Subsequent Supreme Court Equal Protection Jurisprudence*

Most dress code case law was established before the Supreme Court's Equal Protection gender-discrimination jurisprudence was fully developed.<sup>187</sup> As such, not only is it likely that courts would now be more open to hearing challenges to dress codes, but it is also likely that a number of cases would come out differently in light of the standard set forth in *United States v. Virginia*.<sup>188</sup>

In *Virginia*, in 1996, the Supreme Court clarified that the government's justification for a sex-based classification must be sincere and cannot be pure conjecture nor based on gendered stereotypes.<sup>189</sup> Thus, a school may not justify its dress code in a way that relies on stereotypes about the different skills, capabilities, or inclinations of male and female students.<sup>190</sup>

A number of judicially challenged dress code policies have required students to dress in conformity with their gender, such as in the form of jewelry or

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<sup>183</sup> See *Tinker*, 393 U.S. at 506 (limiting the broad authority of school officials so as to prevent them from infringing on students' constitutional rights). See generally *supra* notes 58–64 and accompanying text.

<sup>184</sup> See *Hayden*, 743 F.3d at 582 (invalidating a school's hair length requirement); *Sturgis v. Copiah Cty. Sch. Dist.*, 2011 U.S. Dist. LEXIS 105065, at \*3–7 (S.D. Miss. Sept. 15, 2011) (denying a motion to dismiss in order to further evaluate the plaintiffs' arguments and the school's proffered justification). This is consistent with the Supreme Court's requirement that a governmental justification for sex-based classifications must be genuine. See *Virginia*, 518 U.S. at 533.

<sup>185</sup> See *infra* notes 187–194 and accompanying text.

<sup>186</sup> See *infra* notes 195–212 and accompanying text.

<sup>187</sup> See *supra* note 176 and accompanying text (noting the timeline of Equal Protection jurisprudence in the context of sex discrimination and that of dress code litigation).

<sup>188</sup> See *supra* note 176 and accompanying text. See generally *Virginia*, 518 U.S. at 533 (articulating the level of scrutiny that is required when analyzing sex-based classifications under the Equal Protection Clause).

<sup>189</sup> *Virginia*, 518 U.S. at 533.

<sup>190</sup> See *id.* (requiring government justifications to amount to more than mere conjecture and prohibiting justifications that are based on “overbroad generalizations” about the differences between males and females).

attire to the prom.<sup>191</sup> The requirement that students dress in a way that is normal for their gender contains an inherent presumption that there is a “normal” way for members of a gender to dress and relies on stereotypes about the preferences of boys and girls.<sup>192</sup> As such, the two high schools that justified their prohibition of boys wearing earrings on the grounds that the style’s rarity adversely affected classroom focus and discipline would unlikely prevail today.<sup>193</sup> Similarly, a requirement that boys wear tuxedos to the prom rather than dresses, or that girls wear dresses and not tuxedos, also reflects a generalization about the ways in which males and females prefer to dress.<sup>194</sup>

### B. Distraction as Justifications

A school’s desire to prevent classroom distraction has been considered a legitimate interest that may justify a sex-based classification.<sup>195</sup> Students seeking to challenge their dress codes may argue, however, that these justifications

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<sup>191</sup> See, e.g., *Harper v. Edgewood Bd. of Educ.*, 655 F. Supp. 1353, 1356 (S.D. Ohio 1987) (analyzing a school’s ejection of students from the prom because a female student was wearing a tuxedo and a male student was wearing a dress); *Hines*, 651 N.E.2d at 331 (analyzing prohibition against boys wearing earrings that was articulated through a rule requiring students’ jewelry to remain consistent with community norms); *Jones v. W.T. Henning Elem. Sch. Principal*, 721 So. 2d 530, 532 (La. Ct. App. 1998) (analyzing prohibition against boys wearing earrings).

<sup>192</sup> See Greenblatt, *supra* note 66, at 295 (suggesting that a hair color requirement for highlights imposed on female students would reflect stereotypes about color preferences and that a prohibition on boys having highlights reflects a stereotype about hairstyles that are considered feminine). See generally *Virginia*, 518 U.S. at 533 (prohibiting justifications relying on stereotypes about the “preferences” of males and females).

<sup>193</sup> See *Hines*, 651 N.E.2d at 335 (noting that requiring students’ appearances to conform within the community is a legitimate means of instilling discipline); *Jones*, 721 So. 2d at 532 (finding the fact that it was uncommon for elementary school boys to wear earrings supported the school’s interest in limiting classroom distractions). This is further supported by the Supreme Court’s more recent reiteration that Equal Protection jurisprudence must recognize that notions of what is considered unfair or unequal within the context of Equal Protection evolve over time. See *Morales-Santana*, 137 S. Ct. at 1690 (noting that the government’s proffered justification for a classification must be considered important within the context of today’s understanding of equality (quoting *Obergefell*, 135 S. Ct. at 2603)). Moreover, it is also possible, although less likely, that the school that required students attending the prom to dress in conformity with their genders would be found to be in violation of the Equal Protection Clause in the context of sex discrimination. See *Harper*, 655 F. Supp. at 1356 (finding no Equal Protection violation where a school required males to wear tuxedos and females to wear dresses to the prom).

<sup>194</sup> See *Harper*, 655 F. Supp. at 1356 (finding it constitutional for a school to require its students to dress in conformity with their gender at the prom). Here, however, it is less likely that a court would find an Equal Protection violation because the policy was an evenly enforced, gender-neutral policy. See *id.*; see generally *Feeney*, 442 U.S. at 273–74 (requiring that gender-neutral policies have intentionally disparate impacts before subjecting them to heightened scrutiny under the Equal Protection Clause).

<sup>195</sup> See *supra* notes 162–166 and accompanying text (discussing distraction justifications); *supra* notes 167–171 and accompanying text (discussing the community norms and discipline justifications).

are no longer acceptable given their reliance on stereotypes.<sup>196</sup> Recently, the notion that girls' bodies are distracting has been criticized as an idea that perpetuates stereotypes about boys' inability to control their desires and girls' responsibility for helping them do so by covering up.<sup>197</sup> Although this justification may have been legitimate in the past, the Supreme Court has noted the importance of taking into consideration contemporary societal points of view.<sup>198</sup> Accordingly, lower courts evaluating schools' justifications in Equal Protection analyses should be sure that the objective is consistent with current notions of fairness and equality.<sup>199</sup> The Supreme Court's Equal Protection jurisprudence has also cautioned against the perpetuation of gendered stereotypes, especially when they are relied upon in the government's proffered justification.<sup>200</sup> Therefore, the assertion of the stereotype that girls' clothing is too distracting, without more, may no longer be a sufficient justification.<sup>201</sup>

This is not to say that it will never be sufficient because the prevention of distractions is still a legitimate school interest.<sup>202</sup> If schools are able to demonstrate that their desire to prevent distraction is not one-sided and that they are just as concerned with male students wearing distracting clothing, they will

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<sup>196</sup> See *Morales-Santana*, 137 S. Ct. at 1690 (noting that evolving societal points of views regarding equality must be considered when analyzing an Equal Protection case); *Virginia*, 518 U.S. at 533 (prohibiting reliance on stereotypes); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) (noting that although the government justification of providing for needy spouses was important, it did not justify the extra requirements for male widowers to get death benefits that female widows were not subject to).

<sup>197</sup> See Chemaly, *supra* note 11 (criticizing the distraction justification for only focusing on what is distracting to heterosexual male students, rather than what might distract girls and LGBTQ students, and for telling girls that they are responsible for boys' behavior); George, *supra* note 6 (describing female students' protests against the distraction justification); Orenstein, *supra* note 11 (noting that schools often focus on girls with certain body types when concerning themselves with allegedly distracting clothing and implying that this sends a message that "young men cannot control themselves in the presence of a spaghetti strap").

<sup>198</sup> See *Morales-Santana*, 137 S. Ct. at 1690 (noting that Equal Protection analyses should account for evolving notions of equality that may reveal that previously accepted practices are discriminatory).

<sup>199</sup> See *id.*; *supra* note 50 (discussing the Supreme Court's suggestion that Equal Protection analyses account for current societal viewpoints and lower courts' application); see, e.g., *Nat'l Coal. for Men v. Selective Serv. Sys.*, 2019 U.S. Dist. LEXIS 28851, at \*14, \*25–26 (S.D. Tex. Feb. 22, 2019) (stating that it is "insufficient that the law served an important [governmental] interest in the past" and therefore invalidating a gender-based classification that had been justified in the past but was now understood to merely reflect gendered stereotypes (citing *Obergefell*, 135 S. Ct. at 2603)).

<sup>200</sup> See *Virginia*, 518 U.S. at 533 (forbidding governmental reliance on stereotypes in defending against Equal Protection challenges).

<sup>201</sup> See *id.*

<sup>202</sup> See *Tinker*, 393 U.S. at 509, 513 (discussing distraction justification); *Fenceroy v. Morehouse Par. Sch. Bd.*, 2006 U.S. Dist. LEXIS 949, at \*11 (W.D. La. Jan. 6, 2006) (finding the prevention of distraction to be a legitimate school interest); *Long*, 121 F. Supp. 2d at 627 (recognizing schools' need to prevent distraction).



likely defeat an Equal Protection challenge.<sup>203</sup> Given courts' indications that schools may be able to defend themselves by offering proof of a broad, comprehensive dress policy that applies with equal force to male and female students, the likelihood of schools prevailing may increase with the number of ways in which they seek to limit classroom distractions in general.<sup>204</sup> Moreover, if courts were to demand proof that the dress code is applied to both genders, this may also have the added benefit of deterring schools from singling out female students in the enforcement of the dress codes.<sup>205</sup>

Courts may also employ a more searching analysis of this justification by seeking actual proof that male students are distracted by girls' revealing clothing.<sup>206</sup> The Supreme Court has cautioned against automatically accepting government justifications without actual proof and has emphasized that the justifications must be more than pure conjecture.<sup>207</sup> Given the leeway that courts often give school administrators, influenced by schools' pedagogical responsibilities and expertise, this may be sufficient to transform a stereotype into a more grounded rationale.<sup>208</sup> Absent proof that distractions are actually caused by only girls' clothing, however, this justification amounts to nothing more than a stereotype about boys' ability to control themselves and would therefore be deemed invalid under the Equal Protection Clause.<sup>209</sup>

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<sup>203</sup> See *Hayden*, 743 F.3d at 581–82 (noting that the unconstitutional hair-length policy might have survived scrutiny if the school had offered proof that there was a similar, though not identical, requirement imposed on female students).

<sup>204</sup> See *id.* (discussing the possible constitutionality of broad, comprehensive dress codes); see also *Peltier*, 384 F. Supp. 3d at 597 (noting the lack of a comparable burden on male students after having found a rule requiring female students to wear skirts to be unconstitutional).

<sup>205</sup> See *supra* notes 11, 139 and accompanying text (discussing the ways in which school dress codes and their enforcement target only female students).

<sup>206</sup> See *Olesen v. Bd. of Educ.*, 676 F. Supp. 820, 821, 823 (N.D. Ill. 1987) (accepting a school's justification that a ban on boys' earrings prevents gang activity because the school offered proof of gang activity in the school and that it was symbolized through boys wearing earrings). See generally *Virginia*, 518 U.S. at 533 (requiring that justifications be real and not hypothesized). Schools would likely be most successful in asserting a distraction justification if they were able to offer empirical proof that revealing clothing causes classroom distractions. See *Breen v. Kahl*, 296 F. Supp. 702, 709 (W.D. Wis. 1969) (expressing desire for empirical data or testimony regarding actual occurrences in Equal Protection analysis of dress code); *James & Zara*, *supra* note 27, at 18 (noting that many federal courts seek statistical evidence when determining whether a classification is substantially related to the governmental objective).

<sup>207</sup> See *Virginia*, 518 U.S. at 533, 535 (“[O]ur precedent instructs that ‘benign’ justifications proffered in defense of categorical exclusions will not be accepted automatically . . .”).

<sup>208</sup> See *supra* notes 182–183 and accompanying text (discussing flexibility given to schools due to courts' fear of interfering in schools' daily operations and lack of expertise in matters of educational policy).

<sup>209</sup> See *Virginia*, 518 U.S. at 533 (prohibiting justifications from relying on overbroad stereotypes); *supra* note 180 and accompanying text (discussing the recent but widespread characterization of the distraction justification as one that is based on stereotypes). Courts have taken this approach for Due Process analysis of hair-length requirements as well and have accordingly found them unconstitutional when claims lacked sufficient evidence of actual distraction. See *Sims v. Colfax Cmty. Sch.*

Even with proof that girls' clothing can distract boys, however, schools should be cautious of the messages that this justification sends to students.<sup>210</sup> The one-sided nature that characterizes many dress codes gives female students an array of subordinating messages—for example, that girls alone are responsible for preventing boys' sexual desires, that girls' bodies are sexual objects, or that boys' education is more of a priority than that of girls.<sup>211</sup> Given the fact that girls are often removed from class or extremely humiliated during class, the enforcement of dress codes may be just as distracting as the clothing itself, making some dress codes counter-productive to their purported justification and less likely to withstand constitutional scrutiny.<sup>212</sup>

### CONCLUSION

Although schools are given a significant amount of leeway when it comes to educating their students, they are not immune to allegations of constitutional

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Dist., 307 F. Supp. 485, 489 (S.D. Iowa 1970) (finding a hair length rule unreasonable under the Due Process Clause due to lack of evidence that long hair served as a distraction); *Breen*, 296 F. Supp. at 709–10 (finding in a First Amendment and Due Process analysis that the school had failed to prove that unusual haircuts were sufficiently distracting to justify the policy). The courts in these cases were skeptical of the proposition that students were distracted when it was unsupported by actual evidence. *See Sims*, 307 F. Supp. at 489 (referring to the school's concern about distraction as "mere conclusions based on subjective reasoning that long hair *may* be disruptive of the academic process"); *Breen*, 296 F. Supp. at 709 (pointing to significant amounts of testimony by school administrators opining that unusual appearances distract other students but a lack of testimony of actual occurrences of such distraction or any empirical data supporting the notion). Similarly, the *Peltier* court noted a lack of evidence for the related justification of maintaining classroom order. 384 F. Supp. 3d at 596–97. Here, the school maintained that a requirement that girls wear skirts contributed to the high test scores of its students, but failed to offer any evidence to support this argument. *Id.* at 588. Moreover, the school argued that the rule helped maintain order in the classroom but, again, could not state how this rule helped fulfill this goal. *Id.* at 596–97.

<sup>210</sup> *See Harbach*, *supra* note 58, at 1043–44 (discussing the numerous harmful messages that dress codes targeting female students send).

<sup>211</sup> *See id.*; Chemaly, *supra* note 11 (detailing similar effects); Bates, *supra* note 11 (describing further messages being sent to female students); *see also Peltier*, 384 F. Supp. 3d at 587 (noting the plaintiffs' argument that a uniform policy requiring females to wear skirts "sends a message that their comfort and freedom to engage in physical activity are less important than those of their male classmates"). *See generally Virginia*, 518 U.S. at 534 (cautioning against the use of classifications to "create or perpetuate the legal, social, and economic inferiority of women").

<sup>212</sup> *See George*, *supra* note 6 (telling the story of a girl who was forced to miss a portion of class because she was allegedly distracting other students with her leggings); Sullivan, *supra* note 11 (describing the humiliation a student faced when forced to wear a bright t-shirt that said "dress code violation" in school). The plaintiffs' arguments in *Peltier* demonstrate the ways in which dress codes and their enforcement may sometimes serve to create, rather than prevent, distractions. *See* 384 F. Supp. 3d at 587 (describing the disruptions caused by a requirement that female students wear skirts). Here, the female students contended that requiring them to wear skirts forced them to focus so much on the ways that they positioned their legs that they were distracted from class. *Id.* Moreover, when students violated the uniform rules, they were sometimes taken out of class and the school would either require the student to stay in the office or would call the student's parents so that the student could go home for the day. *Id.*

violations. Public schools that treat their students differently on the basis of sex must have a genuine and exceedingly persuasive justification for doing so. Students who feel that their public schools' dress codes unfairly target girls may be able to bring successful Equal Protection challenges against their schools. Students and adults throughout the country have taken a stance against schools, criticizing them for telling girls that their bodies serve as distractions to the boys in their classes. Many have characterized the message these dress codes send as one that says that girls' bodies are sexual objects and that boys are incapable of controlling themselves. Given the Supreme Court's mandate that Equal Protection jurisprudence account for evolving ideas of equality, the notion that girls who wear clothing that exposes their backs or shoulders distracts other students should no longer suffice.

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